

**Valuing native title: Aboriginal, statutory  
and policy discourses about compensation**

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## Abbreviations and acronyms

Act, the	<i>Native Title Act 1993</i>
AGPS	Australian Government Publishing Service
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
AIAS	Australian Institute of Aboriginal Studies (now AIATSIS)
ALRA	<i>Aboriginal Lands Rights (Northern Territory) Act 1976</i>
ANU	The Australian National University
AURA	Australian Rock Art Research Association
ATSIC	Aboriginal and Torres Strait Islander Commission
CAEPR	Centre for Aboriginal Economic Policy Research (ANU)
Heads	Heads of Damages
ILUA	Indigenous Land Use Agreement
legislation, the	<i>Native Title Act 1993</i>
NNTT	National Native Title Tribunal
<i>Mabo (No 2)</i>	<i>Mabo v Queensland (No 2)</i>
UNSW	University of New South Wales
<i>Ward</i>	<i>Western Australia v Ward</i>
<i>Yanner</i>	<i>Yanner v Eaton</i>

## Summary

The issue of native title compensation generates deep divisions and conflicting evaluations in Australia. Underlying the tensions are unresolved questions concerning the nature of the native title that might be affected; how loss, impairment and extinguishment are to be determined and measured; who is entitled to compensation and on what basis; what might constitute just terms for that compensation; and who is to pay it. To date, solutions have largely been dominated by legal and economic valuation discourse, often pursued within highly charged contexts of resource development or court litigation. This paper presents a largely anthropological and ethnographic analysis of these matters by examining some of the competing modes of discourse about compensation; namely, the Aboriginal, statutory, common law and policy discourses.

The primary focus of the paper is on one particular mode of discourse which seems largely to have been missing from the public debate to date, but which is arguably central to it; namely, that of Aboriginal groups in respect to their own regimes of compensation derived under Aboriginal law and custom. For that purpose, the paper commences with an ethnographic analysis of Aboriginal compensation processes, concepts and criteria, and seeks to extrapolate the core compensatory principles and values that might be generally applicable. Many Aboriginal groups across the country continue to exercise varying compensatory rights, interests and responsibilities that are derived from Aboriginal law and custom, and are directly relevant to native title over land and waters.

The paper then proceeds to describe the distinguishing features of the multiple statutory pathways established for compensation under the *Native Title Act 1993*—for there remains considerable confusion about them. Aboriginal people bring the values, behaviours and logic grounded in their own culturally-based compensation processes with them when they engage in these statutory procedures. The Aboriginal discourse about compensation is not always compatible with Western legal principles or market valuation models. Nor is it always comprehensible to other parties involved in statutory negotiations or determinations of compensation.

The paper then considers the value systems revealed in Aboriginal compensatory processes, and their implications for how ‘loss’, ‘extinguishment’ and ‘just terms’ might be better conceptualised by the common law and in practical negotiation settings. It is argued that a core attribute of native title is that it is ‘cultural property right’ and that land is an inalienable Aboriginal possession, the extinguishment of which would require full reinstatement.

The paper then draws together these seemingly disparate threads to argue the need for a new ‘recognition space’ for ‘native title compensation’. It is proposed in the second half of the paper that native title compensation is, like native title itself, *sui generis*, or unique. Native title compensation will require an innovative jurisprudential approach that acknowledges it as a fundamentally new creature,

recognisable at the intersection of Aboriginal and Western laws. A precondition for that innovation will be the creation of a recognition space that ameliorates the legal ethnocentrism of the common law, and addresses the intrinsic value to Aboriginal people of their lands and waters. To assist in that objective, the paper proposes a 'Heads of Damages' for possible use in the more formal arena of arbitration and court determinations about compensation. The Heads is developed on the basis of the actual losses potentially experienced by individual, communal and future generation native title holders. Guidance as to the content of a Heads is taken from the Aboriginal compensation principles and criteria that are described in the first part of the paper.

The paper concludes by highlighting the implications of these often incommensurable modes of discourse for practical negotiation and determination of native title compensation. A series of key policy challenges and long-standing lessons are discussed, including the issue of static compensation, substitution compensation, distributive equity and spread, the need for transparency and benchmarks, and proposed taxation arrangements for native title compensation. These policy and practical matters will all need to be addressed in order to secure just and sustainable compensation processes.

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Some of the technical and statutory issues which have informed this paper have been discussed in the publication *Members' Guide to Mediation and Agreement Making under the Native Title Act 1993* edited in 2000 by Mary Edmunds and myself, and published by the National Native Title Tribunal. I would like to thank

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## Introduction

Writing about compensation for resource development in Papua New Guinea, anthropologist Colin Filer (1997: 156) reported that:

Arguments about 'compensation' . . . are not merely the result of conflicting evaluations of things which have been lost, damaged or destroyed; they also seem to reflect a deeper division over the definition of 'compensation' itself, and hence the conceptual and emotional relationship between 'compensation' and the other forms of property or value which engage the minds of the participants.

Similar deep divisions and conflicting evaluations engage the mind of parties in the Australian arena of native title compensation. Underlying the conceptualisation, negotiation and determination of native title compensation lie highly charged issues of cultural and legal ethnocentrism.

In Australia, multiple statutory pathways to securing potential compensation have been established under the *Native Title Act 1993* (hereafter referred to as 'the Act' or 'the legislation'). Some involve negotiation and mediation; others require arbitration and court determination. There are also different modes of discourse about native title compensation, using languages which often display an incommensurability of meaning and practice. Alongside the statutory, there are common law, policy, economic and Indigenous discourses, each operating according to its own logic, principles and criteria. When these discourses about compensation engage, competing views quickly arise about the specificity of such terms as 'native title', 'impact' and 'effect', and related matters of scale, duration and degree. A common feature, however, of these disparate discourses is that all are grappling with the concepts of property, value, extinguishment and loss; concepts which are increasingly subject to investigation by tribunals and hearings around the world (see Hann 1998; Jorgensen 1995; Kirsch 2001; National Native Title Tribunal (NNTT) 1999; Posey 1990).

With such highly charged matters at hand, this paper is a preliminary attempt to disentangle some of the threads of incommensurability. Two key modes of discourse about compensation—the Aboriginal and the statutory—are examined in some detail to draw out their key principles and concepts.<sup>1</sup> This serves several purposes. The first is to clarify the distinguishing features of the multiple statutory pathways established for compensation under the Act—for there remains considerable confusion about them. The second is to consider the implications of the statutory and related common law procedures for securing practical and just outcomes. The third is to highlight some of the key policy challenges and long-standing lessons that will need to be addressed in order to secure such outcomes.

The fourth and perhaps primary purpose is to more fully explicate one discourse about native title compensation that seems to have been largely missing from the public debate to date, but which is arguably central to it; namely, that of Aboriginal groups in respect to their own regimes of compensation sourced in

Aboriginal systems of law. For that purpose, the paper commences with an ethnographic analysis of Aboriginal compensation processes, principles and concepts, and of the related rights, interests and responsibilities in land that are embedded within these. The paper considers the value systems revealed therein, and their implications for how 'loss', 'extinguishment' and 'just terms' might be better conceptualised for the purposes of common law consideration and the negotiation of compensation.

An overall objective is to draw together these seemingly disparate threads in order to construct a 'recognition space' for 'native title compensation'. It is argued in the second half of the paper that native title compensation is, like native title itself, *sui generis*, or unique. Native title compensation will require an innovative jurisprudential approach that acknowledges it as a fundamentally new creature, recognisable at the intersection of Aboriginal and Western laws. Such an approach will entail the 'construction of emergent principles' and 'new rules' (French 2000: 3). A precondition for that innovation will be the creation of a recognition space that ameliorates the legal ethnocentrism of the common law, and addresses the intrinsic value to Aboriginal people of their lands and waters. Such an approach would need to be based on an exegesis of logically probative facts about the Aboriginal value of 'cultural property' (see below and Kirsch 2001), and about the related compensatory rights and interests exercised by Aboriginal people. To assist in that objective, the paper proposes a 'Heads of Damages' (Heads) for possible use in the more formal arena of arbitration and court determinations.

## **The emerging discourses and divisions over compensation**

An important mode of discourse about native title compensation is carried out in statutory and common law terms. In the *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (hereafter *Mabo No 2*) decision, the High Court declared that the common law of Australia recognises and affords protection, under certain conditions, to the native title rights and interests of Indigenous Australians. The decision also stated that while there may be locations where native title has survived intact, there would be circumstances—past, present and future—in which native title could be impaired or extinguished.

The *Mabo No 2* decision and the subsequent *Native Title Act 1993* enacted by the Federal Government established the legal principle that compensation may be payable to native title holders for specified actions (referred to as 'acts' in the legislation) which lead to 'extinguishment' or to any 'loss, diminution, impairment or other effect . . . on their native title rights and interests' (ss. 48, 51(1)). An act is said to 'affect' native title if it 'extinguishes' native rights and interests in lands or waters, or is 'otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise' (s. 227). The historical fiction of *terra nullius* was thereby replaced with the legal fiction of extinguishment.

What constitutes loss, diminution, impairment or extinguishment—and whether the latter may be partial or full—is not yet settled by the Australian courts and is subject to ongoing debate (Bartlett 2000; French 2000; Neate 1999). The statutory framework prescribes as an overriding measure that an entitlement to compensation is ‘an entitlement on just terms’ (ss. 51, 53). Compensation on ‘just terms’ seems a governing issue—the way in which ‘just terms’ is defined is at least as important as defining what ‘compensation’ might mean.

In Australia, the debate about how to conceptualise and value native title compensation is linked to the fundamental question of what constitutes native title. Native title is broadly defined in the legislation to mean:

- the ‘communal, group or individual rights and interests in relation to land or water’;
- where those rights and interests are possessed under ‘traditional laws acknowledged, and traditional customs observed by’ Indigenous Australians;
- where people, ‘by those laws and customs, have a connection with the land and waters’;
- those ‘rights and interests are recognised by the common law of Australia’ (s. 223(1)); and
- it is specified that native title includes hunting, gathering and fishing rights and interests (s. 223(2)).

The legislation has left many critical issues and concepts open for practical resolution. The specific details remain to be worked out between parties in negotiation or in the courts. With regard to compensation, there is considerable uncertainty about the following key issues.

- What are the native title rights and interests that have been, or might be, affected by an ‘act’ of government or a third party?
- What is the nature of the act’s impact on those native title rights and interests?
- How is loss, impairment or extinguishment to be determined?
- Who is entitled to compensation and on what basis?
- Who pays compensation and on what basis?
- How is the extent of compensation to be measured and its form determined?

A range of opinions are expressed by stakeholders. To date, proposed solutions have largely been dominated by legal and land valuation discourse, often pursued within highly charged contexts of resource development or court litigation (see, in particular, Gardner 1998; Sheehan 1997, 1998). Not surprisingly, many parties are looking for the elusive Holy Grail of a formula or standardised procedure for the calculation of compensation.

However, a practical way forward is made difficult by a number of factors. Common law recognition of native title is in its infancy in Australia. Described as a 'moveable feast' (Edmunds & Smith 2000: 4; see also French 2000), it is developing case by case, not always in a consistent manner, and in circumstances where the traditional laws and customs from which native title is 'solely derived', are 'incompletely known' and 'imperfectly comprehended' (*Mabo No 2*).

Another challenge is the complexity of the statutory framework. Different potential types of statutory compensation have been created with multiple pathways by which they might be secured; and each pathway invokes distinctive processes, principles and criteria. Amendments to the legislation made in 1998 also generate a greater degree of intersection between certain pathways, enabling more flexible combinations of processes to be activated, but also adding to the overall complexity.

Furthermore, the term 'compensation' is used differently throughout the legislation, and nowhere is it defined. Also, it is used interchangeably with other terms such as 'condition', 'consideration', 'payment', and 'trust amount'. In effect, native title compensation can be negotiated, mediated, arbitrated or determined via different statutory procedures which invoke differently defined categories of native title parties. In a number of instances compensation can be secured at the same time that other 'conditions' apply which, in turn, have a compensatory character.

These complex permutations arise because the legislation not only establishes procedures for the common law recognition and protection of native title, but also for its legal extinguishment, forced taking, and loss. It also affords statutory entitlements which allow native title rights and interests to be traded by way of negotiated consent. The High Court has declared that the rights of negotiation are 'valuable rights' which enable applicants to 'protect' their claims and may result in them 'obtaining a commercially beneficial settlement'. The legislation thereby provides 'claims of native title [with] an economic as well as a spiritual and physical dimension' (McHugh at 253, 259 in *North Ganalanja Aboriginal Corporation v Queensland* (1996) 135 ALR 225). In a number of contexts, these tradeable statutory rights are being used as bargaining leverage to secure compensation, not only as a consequence of temporary impairment or diminution, but also as a straightforward means to revenue sharing. In many of these cases, extinguishment simply has not been an issue.

To add to the statutory and common law complexity, there is an Indigenous discourse about compensation. Culturally-based criteria and values are held by Aboriginal people about the nature, purpose and means of determining of compensation. Many groups across the country continue to exercise compensatory rights, interests and responsibilities that are derived solely from Aboriginal law and custom and that are directly relevant to native title over land and waters. Like the *Native Title Act 1993*, Aboriginal regimes of compensation

have multiple pathways, principles and criteria, and outcomes that are subject to negotiation in the shadow of the law.

Importantly, Aboriginal people bring the values, behaviours and logic grounded in their own culturally-based compensation processes with them into the native title negotiation and litigation arena. The Aboriginal discourse about compensation is not always compatible with Western legal principles or market valuation models. Nor is it always comprehensible to other parties or institutions involved in negotiating or determining compensation under the legislation.

Inevitably, whichever statutory pathway is pursued, parties confront deeper divisions that unfold as they attempt to translate the different discourses of compensation. The languages of these discourses often display an incommensurability of meaning.

If 'just' and sustainable outcomes are to be secured, an innovative jurisprudential and policy approach is required that acknowledges native title compensation as a fundamentally new creature: the combined product of several modes of discourse that is recognisable at the intersection of Aboriginal and Western laws. Such an approach will entail the 'construction of emergent principles' and 'new rules' (French 2000: 3), and the development of enabling policy frameworks to facilitate agreement-making and settlements.

## **Aboriginal regimes of compensation**

In this section a cross-section of ethnographic literature is reviewed and combined with the author's field research experience in urban, rural and remote communities over a period of 27 years, in order to elucidate the general features of the compensation regimes operating within Aboriginal societies. The constituent principles, criteria, values and processes are drawn out, and their embeddedness within an overarching system of rights and interests in land and waters is described. The outcomes pursued by Aboriginal people from their own compensation processes are highlighted.

This review is preliminary and is not an exhaustive coverage of the available literature. There are obvious gaps in time periods and locations; especially for areas of settled Australia where the historical and ethnographic record is often thin. It is not the intention here to promote a culturally static or reified account of Aboriginal compensation regimes; the social organisation and land tenure systems which underlie them are dynamic and so, therefore, are compensation processes and mechanisms. Furthermore, there is considerable diversity in the forms of social and economic organisation evident across the country, so that constituent rights, interests and responsibilities in land will vary between groups. Compensation processes and mechanisms similarly respond to these variations.

Furthermore, as Sutton (1981) perceptively argued over a decade before the native title legislation existed, Aboriginal people in settled Australia continue to exercise a sense of Aboriginal identity—they retain the 'bones of the culture; that

is, the principles of things such as socialisation of children, family life, their role as kin, modes of conversational interaction, systems of rights and responsibilities, and so on (see also his subsequent detailed ‘updating’ of that argument in Sutton 1998b). I would further argue that they continue to retain and exercise, to varying degrees, forms of distinctly Aboriginal compensation processes, principles and criteria. Accordingly, as Sutton argued in 1981, Aboriginal groups in settled Australia can justifiably demand land rights and compensation for territorial dispossession.

Like native title itself, the specificity of rights, interests and responsibilities exercised under Aboriginal compensation processes will vary on a case by case basis; but also, like native title, there are arguably core compensatory principles and values derived from the underlying system of Aboriginal law and land title which is common across the country. These core structural traits can usefully be extrapolated to a general level of applicability to Aboriginal groups. It is precisely because of that general applicability that parties in negotiation about any matter involving compensation with different Aboriginal groups across Australia, find themselves encountering the same modes of interaction, logic, expectation and discourse. The following analysis attempts to draw out the core traits of Aboriginal compensation processes.

### **Aboriginal law: The grounds for compensation**

Aboriginal groups in many parts of the country continue to possess and exercise compensation rights, interests and responsibilities that are derived under their extant traditional laws and customs.

Aboriginal law operates as a whole system underpinning personal property and communal title, and establishes what some refer to as the ‘right road’ for people to follow. It is not a bundle of accidental principles or isolated relations (Keen 1994; Williams 1986, 1987). But neither does it resemble Western law in its structure, first principles or processes. It has its own notions of precedent and ancient moral authority, externalised into the Dreaming. As Myers notes (1986: 49), the Dreaming and system of law derived from it ‘constitute the ground or foundation of the visible, present-day world’; it is a ‘theory of existence’ in which everything, including land, water, persons, customs, and resources originates.

Concepts of personhood, group identity and human agency are inextricably linked to the law and to land.<sup>2</sup> With its origin in a religiously framed creative epoch, the law constitutes a source of permanent cultural values for Aboriginal societies. It is the repository of law-given precedents and moral authority which is perceived as having no arbitrariness. It provides what Weiner (1992: 4) calls, ‘cosmological authentication’—that is, an authority lodged in the sacred and religious domains which transcends the mundane and impermanent aspects of social life, but which nevertheless dictates in daily affairs how material resources and social practices link individuals, groups and land. Conceived as such, ‘the law’ drives much of customary legal behaviour across different domains; for example, in areas of property rights and responsibilities, marriage and kinship, daily family life and

socialisation, economic production and exchange; ritual and ceremony, and so on (Keen 1994; Maddock 1984; Sutton 1988; Williams 1986, 1987). Dreaming-derived law provides certain people, places and processes with a powerful legitimating force and value.

The paradox (and achievement) of the Dreaming is that it facilitates personal creativity and individual autonomy within an ontological framework that disguises the process of change under a consciousness of permanence and the veneer of conservatism (see especially Morphy 1997; Myers 1986; Weiner 1992). On the one hand, individuals deny unilateral personal agency regarding the law, whose foundation and reproduction are externalised into the Dreaming. Nevertheless, within a spiritually sanctioned view of the law as unchanging, in everyday life there is a fluid 'here and now' quality in which behaviour and events are actively interpreted, negotiated and manipulated in the shadow of the law (Merlan 1998; Myers 1986). As a consequence, human assessments and decisions about circumstances that might require a compensatory response are not necessarily predictable. But when made, they will be framed by recourse to the law.

As a theory of existence and value, the law provides the grounds for people thinking about and practicing compensation. The legitimacy and enactability of rights, interests and responsibilities that comprise Aboriginal compensation processes are constituted by laws that are part of a system of like laws which form an interrelated whole. Aboriginal law governing compensation is based on locally recognised codes of behaviour and shared values regarding what is termed 'wrong-way' and 'right-way' behaviour. It is expressed in public processes for applying sanctions, punishment, redress and restitution. 'Wrong-way' behaviour is responded to and enforced by representatives of social authority, differently constituted according to their age, kin relatedness, ceremonial seniority, power, gender and so on.

Aboriginal conceptualisations of compensation are therefore complex, and correlated to a fundamental relationship posited between the individual, group, land and the eternal law of the Dreaming. As a theory of existence and value that assists groups to actively assimilate and respond to change, and that legitimises change as continuity, the law affords a crucial adaptive mechanism for contemporary Aboriginal societies across the country. Processes of compensation derived from contemporary Aboriginal law and custom are extant amongst many Aboriginal groups who continue to negotiate their exercise of related rights, interests and responsibilities. In the following sections the nature of those processes, rights, interests and responsibilities are further explored.

### **Events and behaviour provoking compensation processes**

Aboriginal compensation is about property—that is, property as defined in terms of what Hoebel (1966: 424) referred to as its essential nature; namely, the network of social relations that governs the conduct of people with respect to the use and disposition of things. As Gray (1994: 192–4, citing Justice Douglas's

decision in the *Sierra Club* case) and Hann (1998) have well understood and clarified for different audiences, the most important ‘property’ in any resource is the right to participate in the selective exploitation or prioritisation ‘of its various forms of value’. To be recognised as having the right to ‘speak for’ an asset, to have a ‘dispositive voice’ in dictating the terms of its circulation, access, utilisation and distribution, is to command ‘an intensely significant component of “property” in the resource’ (Gray 1994: 193). The social conditions for compensation are first activated when the distribution of entitlements to access, use and distribution are called into question or put at risk.

There are certain behaviours and incidents in the Aboriginal domain that may put such entitlements at risk and initiate the need for some form of compensatory assessment and action. A preliminary review of the ethnographic literature (see references) suggests such behaviours and incidents include those listed below.

1. Actions against bodily property, including committing a personal injury and wounding (accidental or otherwise); committing murder and homicide; ‘accidental’ death (in a world where individual agency is disguised, many deaths are perceived to involve religiously-based causation).
2. Theft of objects (including land, ritual paraphernalia, designs), or of power (for example, in the form of knowledge), or of sexual rights (such as by adultery).
3. The failure to resolve indebtedness or respond to reciprocal obligations and demands (whether they be economic, social or ritual), and the refusal to honour contractual obligations (such as for bestowal and marriage).
4. Committing a transgression or offence against persons in authority, especially by younger to older senior people.
5. Verbal trespass (for example, given that speaking for land is an act which confirms and asserts one’s rights of ownership of that land, then talking for country which is not one’s own, or publicly declaring restricted words, constitute important verbal trespasses upon the rights and interests of others).
6. Economic trespass (including the taking of resources from another person’s country without permission or reciprocity).
7. Various acts of religious trespass and sacrilege (including breaches of religious obligation and behaviour, breaches of taboo associated with sites and ceremony, breaches of restricted knowledge; grievances arising from sorcery; and failure to safeguard and manage spiritual resources).
8. Physical trespass onto the geographic space of a dangerous and restricted location, or onto country that is not one’s own, for illicit purposes.
9. Committing damage (including accidental or deliberate) to land and sites, to totemic flora or fauna, as well as the related failure by an individual or group to safeguard and protect land and its environmental resources.



This range of behaviours and events can all be characterised as constituting forms of trespass in its widest meaning. That is, they are perceived by Aboriginal people to be examples of unlawful acts which cause injury to, and improper inroads upon, other groups' or individuals' property, presence, authority, rights and resources. They may be deliberate or accidental, actual or implied, short or long-term in their duration. But as forms of trespass they will be interpreted as an intrusion, transgression or offence, and so deemed to require a compensatory response.

### **Construing the effect of an action or event**

The nature of effect (its quality, scale, duration and so on) is directly related to the type of causative action or event involved. For each action or event such as those listed above that is construed negatively as trespass, the effect of transformation and loss confronts people. For example, an action may challenge the distribution of social relations or potentially sever them, infringe rights in the use and disposition of things, jeopardise principles of authority, or make vulnerable the legitimising force of the law and Dreaming. In other words, the extent of effect has many dimensions, and these are subject to interpretative construction by individuals and groups.

The ethnographic literature makes it clear that Aboriginal landowners will investigate the nature and possibility of effect across a range of domains, including on:

- the land and sea, and sites within them;
- people's possession, access, use and enjoyment of land and sea;
- individuals, families, groups and their social relations;
- an individual's physical and psychological health and wellbeing;
- the environment and its natural resources;
- religious life and the law itself;
- the systems of knowledge related to the above; and
- on group authority over all the above.

It can be generally argued that, within the Aboriginal worldview, effects are not easily quarantined. Rather they are seen to be contagious, easily spreading from one of the above domains to others, and they may have multiplier effects that potentially escalate conflict in the process (see e.g. Chase 1980: 283–5; Sutton 1995: 42, 46, 57; Williams 1987). The logic used by people to interpret this contagion emphasises the effect of an action or event on both the visible and invisible worlds. An intimate interdependence is perceived to exist between these worlds; for example, conception, foetal nurturing, birth, the bodily wellbeing of humans, and their eventual death are all regarded as being spiritual as well as physiological processes and, above all, are causally linked to the spiritually embodied land (see Morphy 1997; Munn 1986; Smith 1981). Land not only

contains the bodies and spirits of past ancestors who have 'gone down' into it, but it also incubates the spiritual essences from which fetuses are created and babies 'come up' (Smith 1981). Its geographical features also represent the metamorphosed forms and imprints of the Dreaming creator beings. All these essences of spiritual signification are regarded as exercising an active agency in the real world—an agency which can directly affect individual physiological development and physical wellbeing. For example, a person may bear certain telltale birth marks on their body that were put there by a particular Dreaming; they may display physical mannerisms or personal idiosyncrasies from an ancestor associated with their spiritual conception; or evince an attachment to a particular story or totem because they were conceived or born at a related site (see Brady 1999: 166–7; Smith 1981: 181–8). It is not surprising then that the effect of actions may easily spread from the personal, to the social, to the land and law—and vice versa.

An important and sometimes dangerous burden of interpretation is imposed upon key individuals and groups regarding the type of transformations created by an act, in and across these domains. Ongoing assessments will be made of the extent of effect in respect to its scale, duration, and the degree of social and religious repercussions. The gravity of the offence, the motivation and mental state of the perpetrator, the harm done to those people and things at the hub of effect, the prevalence of the action, and the need to uphold the law through deterrence, are all factors taken into account in the complex process of interpreting effect and thereby determining a compensatory response.

Evaluations of the nature of the effect may be carried out publicly. Williams (1987: 49–66) describes the holding of clan 'moots' as a mechanism of dispute settlement amongst the Yolgnu (see also Berndt & Berndt 1952; Chase 1980; Elkin 1931: 191; Memmott 1979: 97–103). This involved intervention and management by persons with political authority, the gathering and checking of information, obtaining admissions of culpable acts, confirmation of action to be taken, and the application of sanctions. But when the effects of actions and incidents fall squarely within the realm of sacrilege and breach of religious taboo, consideration of similar issues will be restricted to closed group of religious authorities and dealt with summarily and without public declaration.

A critical factor in evaluating the nature of an effect in order to determine the form compensation should take, is the need to identify the social boundaries of groups involved.

### **Identifying the social boundaries of perpetration and impact**

As Weiner (1992) and Kirsch (2001) have noted, loss is a manifestation of the process of social relations. For Aboriginal groups, acts of trespass invariably require the interpretation and assignment of social interests and social responsibility.

An act or event which provokes a compensatory process can most easily be construed as a central point of energy from which radiate a series of

repercussions; rather as a stone which, on falling into water, creates concentric waves whose energy is progressively depleted at the outer margins. In the same way, an act or event will produce a radiating social 'field of perpetrators' and a social 'field of impact' (see also Maddock 1972: 165, who refers to 'fields of guilt'; and Sutton 1995: 42, who refers to the 'politically responsible group' making decisions and asserting rights and interests). The size and spread of the relevant social fields inevitably depends on the extent of transformation and loss created by the impact of the relevant action or event (see Sutton 1995: 42, 46).

The ethnographic literature suggests that identification of these social fields will be based upon an interpretive reading of a mix of factors. The concept of 'distance' has multiple connotations and appears to provide a broad framework within which possible factors are considered. There is a sociology and geography of 'distance' which can be 'measured' in terms of kin relations, and economic, ceremonial, political and ownership rights, interests and responsibilities (Maddock 1984; Myers 1986, 1989).

#### *Possessory and managerial distance*

Individuals and groups have multiple and overlapping ownership and management rights and responsibilities for particular tracts of land, water, sites, and totemic affiliations. Religious, political and economic interests in sites and estates are not exclusively held by their core or primary owners (see especially Sutton 1995). Even persons ostensibly belonging to the same corporate group have 'different ancestries and life histories and, thus, only sometimes share identical "countries"' (Sutton 1995: 33). These degrees of rights, interests and responsibilities will be measured on the basis of people's possessory and managerial distance from the property (be that an object, place, relation or process) that has been affected, and will be taken into account by people at the hub of effect.

In places where land ownership is intimately connected with Dreaming tracks and travelling ceremony, then the patterns of associated rights, interests and responsibilities are extremely complicated (see Sutton 1995: 54–7). Dreamings interpenetrate and connect people together. For example, different groups of people may own or have responsibility for managing the sites, songs or ceremonies associated with an extended Dreaming track crossing a number of their different 'countries'. These groups may all be regarded (and regard themselves) as being directly affected by an impact that occurs at a particular site on one section of that track. For example, Peterson (1993: 77) reports that the beneficiaries of cash payments arising from a gold mining agreement included people who had important ceremonial links to the country on which the mine was located, but who themselves resided some 300 kilometres away from the mine site. Furthermore, as Sutton's (1995, Ch. 1–8) analysis of Aboriginal boundaries and land ownership across the country indicates, Dreamings, powerful sites, ceremonies and stories are of different types and can engage different numbers of people.

The institutional relationship between Aboriginal 'owners' and 'managers' involves a relationship between senior persons that entails notions of compensation, in the sense that it is based upon mutual responsibilities to safeguard places and ritual processes, and a corresponding obligation to 'pay' when mismanagement occurs (Merlan 1982; Trigger 1989: 18–23). Accordingly, the specific persons undertaking the reciprocal set of ritually-based rights and duties to land, referred to in many areas as 'owners' and 'managers', may be included as members of the group affected by the damage to a natural object or site, or the breach of a religious obligation by either owners or managers.

If an action or event is deemed to have significant transformative and multiplier effects, then the inclusion of people in both the fields of perpetration and of effect will likewise be expansive. Sutton (1995: 42) reports, for example, that if a decision is made about 'allowing a major development that will transform a whole region, many groups may . . . be involved, even where the development site itself may be wholly on one small clan estate'. Josif (1988: 11, cited in Cooper 1992: 232) noted that custodians of the Bula sites at Coronation Hill, which were subject to possible mining activity in the early 1990s, were anxious because 'Aboriginal people from other groups share spiritual ties with the Sickness Country . . . and may consider that Jawoyn were not performing their proper role as custodians'. Some Bula custodians feared 'payback' or sorcery if it was decided they had not protected sites properly. In Cape York Peninsula, people who own and perform the same 'dance style' for land that may be affected by an adverse act may be regarded as members of the social field of effect (Chase 1980). Dixon reported how the Aboriginal actors involved in the negotiation of the Glen Hill mining agreement in Western Australia conceived of the social extent of groups affected by the mine in terms of the traditional system of exchange, called *winan*. The *winan* connected distant groups with rights to participate under Aboriginal law, and functioned as criteria for including them in the social field of effect (Dixon 1990: 83–4).

#### *Genealogical distance*

All Aboriginal action and interpretation of events takes place within the 'rubric of relatedness' (Finlayson 1991; Martin 1993; Myers 1986: 117; Sutton 1998b). For the purposes of compensation, distance will also be measured according to degrees of social and kin relatedness. Persons may be excluded from the field of effect by being classified as 'too far away' in terms of their kin relation to the people at the hub of impact. Conversely, on the basis of the 'logic of expansiveness' initially applied by people (Myers 1986: 166), those persons who live far away from an act or event that has occurred, but who are 'close kin', will be regarded as experiencing the same effect as their family at the centre of the effect.

By the same measure, genealogical 'outsiders' who reside with the group at the hub of effect might be vulnerable to inclusion in the field of perpetrators. They may choose or be required to make themselves geographically distant in order to avoid sanctions or punishment. The closer the genealogical relationship of people

identified as the perpetrators of an action, the more immediately fraught becomes the process of assessment, and the more urgent the need to clarify the extent of inclusion and to resolve the situation by way of compensatory settlement.

Reading the intimacy and value of social relations is a difficult, potentially vexatious matter. Memmott (1979: 99) reports that an important part of 'square-up' proceedings carried out after the death of a person was for the immediate family to 'reassure' certain others that they are not suspected in the person's death. Chase (1980: 193) reports that every conflict situation encountered in his research in east Cape York meant that some people 'were caught with divided loyalties'. These people were in fact referred to as *kuuntaryi yi'atyti* ('middle' relations) and were expected not to take sides, but rather to attempt to prevent violence.

### *Geographical distance*

Residential distance from the thing, country or person affected by an act or event combines with other factors to help determine the identity of groups involved. Geographic distance often has complex permutations. For example, residential closeness to the centre of impact of an act will tend to constitute a criteria for inclusion in the field of effect; unless it is counteracted by genealogical distance. As noted above, people who are regarded as genealogically or ceremonially 'close' to the people at the centre of an effect, but who nevertheless live a long geographical distance away, will tend to be included in the field of effect. For example, certain *kunmokurrkurr* groups in the Coopers Creek area of western Arnhem Land characterise themselves as being in a long-distance 'company' relationship which can link them in to shared consideration of compensation and the circulation of royalty payments (Kesteven & Smith 1983).

There will also be a mundane geographic logic by which people can assert that other groups are simply 'too far away' to worry about their feelings or rights. The physical characteristics of the actual area subject to an effect may also mean that the geographical mapping of effects will be perceived to radiate out many kilometres in one compass direction, but be geographically restricted in another. For example, people with country located along the Coopers Creek in western Arnhem Land form a 'riverine alliance' referred to as 'Marryalayala' or 'one creek', so that the effects of some acts are considered to follow groups along the river, rather than travelling inland from it (Kesteven & Smith 1983: 123–5, 140).

### *Distance as degrees of spiritual power*

Within the Aboriginal landscape, places, things and people vary radically in their importance. The relationship posited between people and 'country', and the law and Dreaming, imbues certain mundane things with a numinous character and relative degrees of 'power' or sacredness. There are particular people, places, objects, elements, behaviours and procedures which are regarded as directly expressing transcendent value and power. Some objects and sites accrete power and powerful memories over time, or by association with powerful substances (for example, particular trees which have birthing blood or umbilical cords buried by

them, mortuary sites for powerful persons, sites representing metamorphosed creator beings, sites where ceremony is conducted or important disputes have been resolved, etc). These visible signifiers of power are variously described in Aboriginal English as being 'big', 'number one', 'boss', 'poison', 'sacred' or 'dear'.

The consequences of an act on something 'big' may be seen as apocalyptic and can be transmitted through arterial flows of spiritual power to connect different groups (see Cooper 1992: 227). Some significant sites can be said to generate waves of repercussions that flow outwards to affect a much wider area of country and larger groups of people. For example, in one case, disturbances at related sites were stated as being sensed by Dreaming beings at the main site, and custodians were concerned about exploration activity up to ten kilometres from it (Merlan & Rumsey 1986 cited in Cooper 1992: 227). An effect which may appear insignificant in daily life may be interpreted differently in circumstances where powerful sites are involved. Arndt (1962: 304, 306) noted that in the close vicinity of one such site, sufficient disturbance may be as little as the careless kicking of a rock or stick, or the making of excessive noise (see also Cooper 1992). An effect on 'big' things radiates across land and people, invoking a much bigger social field of perpetration and effect, and requiring the imposition of heavier sanctions and recompense. Small local sites with less transcendental signification may invoke a more tightly defined set of kindred and field of effect.

*Temporal and personal dimensions of perpetration and effect*

The gender, age, and seniority of persons involved in committing an act, or experiencing its effects, are factors taken into account when people measure degrees of social inclusion or exclusion. Other factors are the sentimental forms of attachment by individuals to places and objects which act as memory maps of personal and group histories.

Assessments of the social, physical and spiritual boundaries of effect and perpetration have to be carefully negotiated as they involve cross-cutting attachments, allegiances, politics and enforcement of the law. As Williams (1982: 146) perceptively comments about processes of demarcating the physical limits of country: 'reticence to locate precise boundaries may . . . [reflect] concern about the consequences of doing so, (and conversely)'. The same concern for consequences influences the assessment of social boundaries for the purposes of compensation. As a consequence, the process of evaluating social inclusion and exclusion will often continue in parallel with, and continue after, the actual process of settling compensation.

The contagion and interpretation of current events is also replete with temporal force. Williams' (1987: 65) statement that, for the Yolngu, 'nothing ever really ends' is applicable to most other Aboriginal societies. Old tensions and unsettled grievances from earlier incidents—some occurring generations ago—resonate through present-day social relations and are criteria for considering the motivation behind an action, and the extent of its effect. For example, Williams (1987: 67) reports on her inquiry into charges of sorcery, made after the death of

a senior man in 1969. One explanation was that it began in events occurring at least 30 years earlier, and ultimately involved a large number of people. Memmott (1979: 102) reports that before a proposed dance festival commenced at Doomadgee in late 1974, the several different groups attending spent the first day participating in 'square-up settlements' so that 'old grievances could be settled and . . . not interfere with [its] success'.

By implication then, while the effect of an action may in time recede or stagnate, if it is not appropriately resolved, it will be revived at a future date. The potential is that old grievances and their effects become construed by later generations as compounding or creating new grievances. In other words, the duration of an effect is not necessarily discrete, but may be scattered across time.

In considering effect, custodians of land and close kin bear the burden of what Gray (1994: 195) refers to as the 'principle of stewardship': 'Under this principle, ownership or possession of land is viewed as a trust, with attendant obligations to future generations as well as to the present'.<sup>3</sup> The ethnographic literature indicates that Aboriginal stewardship entails 'looking after' country, people and the law in the present and for future generations, and transmitting the rights and responsibilities of stewardship to them (see Myers 1986; Smith 1981). Both individuals and groups may be held accountable to others for their stewardship. The concepts of ownership, stewardship and effect are underpinned by the notion of a 'community obligation' to preserve over time the collective entitlements to 'equitable property' and 'non-commodity values' (Gray 1994: 202; see also Gray 1991). From this perspective, if land is the property of Aboriginal people, then people are a property of the land.

### **The forms of Aboriginal compensation**

Aboriginal compensation mechanisms reveal social values and preferences. For Aboriginal people, compensation is primarily about social process and prioritising certain relations, and can be enacted in a variety of ways. Invariably, people, the land and the Dreaming are placed at the hub of agency. The need for human action—in the form of sanctions, 'pay back', 'squaring up', recompense, retribution, or exchange—is framed as a necessary stabilising expression of the law.

Compensation can consist of material recompense to the aggrieved person and group. For example, at 'house opening' ceremonies in Cape York conducted some time after a death to 'open' up the deceased's dwelling and 'free' it from spiritual contagion, payments of food and household goods and other capital items are 'paid' by the widow's family to the family of the deceased husband (Martin 1993). Cash is a medium of social exchange, and payments of cash may be required by the aggrieved from persons identified in the field of guilt. For example, Peterson (1991: 75) noted the use of cash payments as a 'compensatory mechanism' in the case of a person paying a relative who had rights to their hair (for ceremonial purposes) when they had a haircut without that relative's knowledge or permission. Access to valued resources may similarly have to be met by the

return of gifts to the owners (for example, as an equivalence, in the form of an artefact made from those resources (Myers 1986)). A person of eminence in the law who performs as a 'witness' to validate another's claims to pre-eminent ownership rights and responsibilities for an area of land or a specific site, may subsequently demand and have to be paid cash as compensatory exchange for their testimonial comment.

Aboriginal compensation also takes many non-material forms. For example, it may take the form of 'an apology' from people or from the government. It may consist of the conduct of ritualised ceremonies or highly orchestrated fights of reconciliation. These are widely reported across place and time, and include those described amongst the Pintubi by Myers (1986: 171); by Elkin (1931: 190–91) in the formal *kopara* exchanges held by the Lakes groups of South Australia; in East Cape York by Chase (1980: 192); in the Lardil 'square-up fights' described by Memmott (1979: 99–103); and in the peace-making ceremony (*magarada*) described in Arnhem Land by the Berndts (Berndt & Berndt 1952: 116). In instances of serious inter-group conflict over certain actions, settlement has been reported in the form of a series of exchanges of small areas of territory between particular groups. The transaction indicated a resolution of conflict, and involved not so much a transferral of ownership of land as a confirmation of continued access and shared rights to exploit resources (Kesteven & Smith 1983: 133).

Compensation may be enacted through the application of sanctions and retaliatory punishment of the perpetrator(s). These mechanisms may be socially enacted (including suppression of social interaction, temporary ostracism or permanent expulsion from the group). They might be physical (including warfare, regulated civil revenge, and death). They might also be enacted through sorcery and the direct intervention of the spiritual domain. Once included within the field of perpetrators, the persons or their close relatives may be expected to allow themselves to be punished, either forcibly by means of spearing, or by offering their body to physically receive another's injury punishment, or by physically replacing the thing itself (for example, a wife may be 'given' to another person in the deceased husband's family).

Individual autonomy has its bounds. People who repeatedly act against the social order eventually bring the action of their aggrieved kin upon themselves. In the past this may have resulted in them being put to death (Chase 1980: 190; Smith 1981: 170–3).

The law is said to be 'hard', and in certain circumstances the law will intervene of its own accord to punish breaches of religious taboo; for example, in the form of serious illness, death, sorcery or religious revenge. There are religiously-empowered enforcers amongst people (and animals) who can instigate sorcery and mete out death. When offended, the spirits of deceased ancestors can punish relations by sending physical and environmental ills. For example, failure to observe requirements for 'looking after' and respecting the graves of close kin 'could bring punishment from the spirit to those who desecrated the physical remains' (Chase 1980: 186). Through sorcery, certain people may also invoke the



particular qualities of a site to bring about physical and environmental calamity on others (for example, by ‘sending’ swarms of flies and mosquitoes, illness, rain and fire, and causing reproductive failure of people, plants and animals). It is the author’s experience that in many contemporary negotiation situations, Aboriginal people feel keenly that their decisions, if determined to be wrong by close kin or their own law, may result in their punishment by ill-fortune and ill-health.

The form that compensation takes is directly linked to the nature of the provoking action or incident; to people’s reading of the type and extent of effects; and to the criteria of social distance involved. In summary, forms of compensation enacted may be:

- action oriented and physical—in the form of punishment and sanctions involving regulated civil revenge, injury or death;
- socially based—as in processes of ostracism, expulsion or self-imposed absence;
- material and monetary—as in processes of exchange of cash, food, services or commodity goods;
- religious and spiritual—via religiously empowered enforcers of punishment, the conduct of cleansing ritual, or through religious ostracism or expulsion; and/or
- symbolic and performative—through apology or highly orchestrated reconciliation fights or planned confrontations.

### **Aboriginal compensation as value system and process**

The Aboriginal semantic domain of compensation appears to be broader than that allowed for by Western economic and legally-based approaches. It is more akin to the *Macquarie Dictionary* definition of the verb ‘to compensate’, as: ‘to counterbalance variations; offset; recompense; to adjust or construct so as to produce equilibrium; to be an equivalent; to make amends’. The dictionary definition recognises the essential plasticity of the concept, and resonates with Aboriginal views where compensation is:

- a process (the act of compensating and the state of being compensated);
- a realm of valuation (for comparing and estimating the worth of a thing);
- an entitlement and responsibility (the kind of compensation given or received as an equivalent for debt, loss, suffering, etc); and
- an outcome (assessed by the extent to which recompense, equilibrium and amends have been secured).

Perhaps the critical feature of Aboriginal compensation is that it is essentially a process-based system in which the relationship between people, the land, law and the Dreaming is paramount. The mechanism of compensation is used to affirm the value of that connection: to achieve defined social purposes; to reaffirm

relationships of mutual equivalence and demand sharing; to bind individuals into groups; and to confirm ownership of the land (see e.g. Chase 1980; Elkin 1931: 191; Kickett 1999; Maddock 1984: 184; Martin 1995: 8; Memmott 1979: 97–103; Peterson 1991: 75, 1993).

Compensation processes reveal realms of value with multiple referents. For example, in evaluating an effect for compensatory purposes, people closely consider:

- the utility value of the thing and relationships involved;
- the extrinsic value as a means to something desirable;
- the inherent social value;
- the moral and authoritative value derived under law;
- its economic value, and so on.

People strategically canvass these aspects of a thing or relationship's 'total value', in order to come to some accepted understanding of the extent to which it is seen to have value, and the form of compensation that will correspond to that value.

Underlying all forms of compensatory response is a notion of equivalence, the value of which has many dimensions. At its heart is the desire to restore sociality and reaffirm relationships of authority and the illusion of cultural permanence. The measure of that balance is in the form of what has been referred to as 'egalitarian mutuality' (Maddock 1984: 184) or 'assertive equalitarianism' (Martin 1995: 8). That is, the outcome should restore the expectation and satisfaction of reciprocity and 'demand sharing' (Peterson 1993), and acquit individuals and groups of indebtedness entailed by their inclusion in the field of perpetrators.

Another measure of balance is expressed in the desire to secure a 'levelling up' or 'squaring up' (pers. comm. P. Memmott and P. Sutton) based on a core principle of 'equivalent injury' (Stanner 1953). To secure that end, the principle of proportionality is applied. However, the outcome sought is not measured as an exact equivalence (in the sense of reducing one thing to another), but in the sense that the form of compensation must be judged as proportional to the loss or damage sustained, and capable of enabling a reinstatement of perceived total value. But restoring sociality and mutual responsibilities is not necessarily about equity. As noted above, some things and people are more 'equal' than others, more powerful, more senior. Accordingly, the balance sought through compensation may be asymmetrical and hierarchical in nature (such as in restoring the relationship of authority between senior and junior generations). People will make subjective judgments as to when the equal 'total value' of an effect has been obtained.

Broadly then, a compensation process may be used to:

- restore and maintain environmental productivity and reproductive capacity;
- safeguard the health and reproduction of people and the land;

- re-establish economic exchange relationships;
- restore and safeguard religious rights, interests and responsibilities; and/or
- confirm the authority of groups and individuals for areas of land and water.

The preferred primary outcome of all forms of compensation is to secure the semblance of finality in social and temporal domains, by acquitting individuals and groups of any perceived indebtedness and guilt entailed by their inclusion in the field of perpetrators.

### **Inalienable possessions: valuing the invaluable**

Just as compensation reveals value, so too competition over the products of compensation reveals that which has been lost, most lost, and its value.<sup>4</sup> The discussion of Aboriginal regimes of compensation so far has indicated that some things are more highly valued than others. This section reviews some ethnographic sources to consider what those things might be, and how that higher value might be construed.

Drawing upon Myer's erudite ethnography of Pintubi sentiment, place and politics, Weiner (1992: 101) notes that the Dreaming-derived law encompasses 'vast inalienable possessions that are authenticated by the very cosmology under which they are produced'. In an important analysis of the nature of exchange and social reproduction, Weiner examines the creation and core meaning of what she calls 'inalienable possessions'—those things (be they land, sites, names, body designs, songs, stories, knowledge, ritual practices or paraphernalia) which become imbued with the intrinsic and ineffable identities of their owners, accreted with history and memories, repositories of genealogies, and are transferred by their owners from one generation to another.

As Weiner (1992: 42) notes, what gives inalienable possessions their power and potency is their authentication by an authority perceived to be outside the present. As a consequence, they act as the stabilising force against loss and impairment, and are critical to the reproduction of group identity and social relations through time. To that extent they are seen as timeless, outlasting their owners who must nevertheless bear the responsibility for recreating their social value over time. Such possessions bestow responsibilities of stewardship, out of which evolve many different levels of authority and relationship. Control over their meanings and transmission from one generation to the next are thus strictly circumscribed, and accords authority and legitimacy to successive owners.

Inalienable Aboriginal possessions are dense with signification, whereby their value is seen to lie in their very inalienability. They have infinite utility and absolute value. They are said by the Anangu to 'come in front'. Such value is translated in Aboriginal English as 'big', 'dear', 'precious'. For Aboriginal groups, land is *cum grano salis*—the incomparable inalienable possession. It is a 'value carrier'; that is, it is 'value as such, the immovable ground above and beyond which real economic activity [is] carried out' (Weiner 1992: 33). Such possessions become invaluable precisely because they are beyond commodification.

As Gray (1994: 161) notes, it is inevitable that all 'property' referents have about them an 'utterly interdependent quality'. This is precisely the case with respect to Aboriginal conceptualisations of land. For example, not only does an individual trace kin relations to other individuals and groups, but to tracts of country and religious paraphernalia which may, in turn, be related to each other as kin (Keen 1994: 110–24). Aboriginal land is an extension of the person and the group—rights in *rem* and in *personam* are at the same level and centred within a spiritual framework (Sutton 1998a). It constitutes what Radin (1982) has called 'property for personhood'. In other words, it is an object that is part of the way we constitute ourselves as continuing personal entities in the world; an analogy very close to Weiner's notion of inalienable possession.

In presenting an argument for the repatriation of the Elgin Marbles, Moustakas (1989: 1185) extends Radin's concept in order to include group rights in cultural property—what he calls 'property for grouphood'—which 'expresses something about the entire group's relationship to certain property . . . [and is] essential to the preservation of group identity and group self-esteem'.

Writers including Kirsch (2001), Coombe (1993), Janke (1997) and Pask (1993) have more recently adapted these ideas to propose the centrality of 'cultural property' as a term encompassing both the loss of property as ownership of an object, and loss of property conceived as a sense of belonging or way of knowing. For Aboriginal Australians, land and its various manifestations in song, dance, knowledge, sites, ritual, names and so on, is more than 'thin air' (Gray 1991); it is cultural property for personhood and grouphood.

Such inalienable possessions of personhood and grouphood can not be easily substituted; they are not fungible. Their value will not be realised in free market exchange. Rather they accumulate a subjective and cosmological value which sets them beyond a reinstatement value. Such valuation defies the philosophy of possessive individualism and market exchange that defines Western legal categories of property (see Coombe 1993, drawing on MacPherson 1962). How then is the loss or impairment of such a possession construed and valued by its owners?

When the locus of an inalienable possession's authenticity is interfered with, then its absolute value declines, sometimes rapidly (Weiner 1992: 102–3). But more fundamentally, 'taking a possession that so completely represents a group's social identity as well as an individual owner's identity and giving it to someone outside the group is a powerful transfer of one's own and one's group's very substance' (Weiner 1992: 104). The loss of inalienable possessions diminishes the person and by extension, the group to which the person belongs.

Coombe (1993: 279) argues in the Canadian context, that the 'commodification of Indian spirituality is understood to pose the threat of cultural dissolution'. Moustakas (1989: 1185) takes the implications of 'property for grouphood' to its logical conclusion. He suggests that such property should not be alienated 'because future generations are unable to consent to transactions that threaten

their existence as a group, and that commodification and fungibility are inappropriate ways to treat constitutive elements of grouphood’.

From a legal perspective Radin (1982: 1014–5) argues that, where property is ‘for personhood’, there is a *prima facie* case that it is a property right that should be protected against invasion by government and against cancellation by conflicting fungible property claims. This case is strongest, she concludes, where ‘the claimant’s opportunities to become fully developed persons ... would be destroyed or significantly lessened, and . . . where the personal property rights are claimed by individuals who are maintaining and expressing their group identity’. Such a case is routinely voiced by Aboriginal people in respect to their invaluable property for personhood and grouphood. The following sections examine the extent to which native title rights and interests in land and water—as clear examples of inalienable possession—are afforded protection against invasion by government and cancellation by conflicting fungible property claims; and how their extinguishment and loss might be, if they should be, valued for the purposes of native title compensation.

## **The discourse about compensation under the *Native Title Act 1993***

In this section we move from the Aboriginal discourse about compensation to the statutory discourse about native title compensation enacted in the *Native Title Act 1993*. At this point I want to avoid becoming bogged down in the technicalities of the Act. Particular aspects of the statutory regime for compensation have been covered elsewhere in more detail (see Bartlett 2000; Edmunds & Smith 2000; Lane 2001; Litchfield 1999; NNTT 1999; Neate 1999; Smith 1998; Sumner 2000). Rather, the purpose here is to describe the multiple pathways established for potentially securing compensation, and to provide an overview of their key principles and criteria.

### **An overview of native title compensation**

Broadly, the legislation sets out the range of ‘acts’ by government and third parties which may affect or extinguish native title. These categories include (Div 5 ss. 48–54):

- certain ‘past acts’ (which were invalid but made valid by the NTA) and took place before the commencement of the legislation on 1 January 1994;
- certain ‘intermediate period act’ (taking place between 1 January 1994 and 23 December 1996 which is the date of the High Court decisions in *Wik Peoples v Queensland* (1996) 187 CLR 1);
- certain ‘future acts’ (which are defined as happening after those dates); and
- when the *Racial Discrimination Act 1975* has the effect that compensation is payable for an effect on native title by a valid past act.

The legislation sets a number of statutory qualifications on the entitlement to compensation, and refers to broad principles of assessment to be followed. These are outlined below.

1. Compensation may variously be payable to registered native title claimants; native title holders, and/or their prescribed bodies corporate; persons claiming to be entitled to it;<sup>5</sup> persons in the 'native title group';<sup>6</sup> and possibly to other Indigenous holders of statutory rights and interests over land which have compulsorily converted or replaced native title rights and interests.<sup>7</sup>
2. It is liable to be paid by governments for acts attributable to them unless they have specified otherwise in relevant legislation, and may be payable under negotiated agreements by any third party liable, or agreeable, to pay.
3. It can be paid only once in respect to acts that are essentially the same (s. 49).
4. In respect to acts affecting native title, compensation consists of money unless the person claiming to be entitled to the compensation requests otherwise, whereupon the court, person or body must consider the request and may make a non-monetary transfer which will constitute full compensation for the act (ss. 51(5-8)).
5. In respect to an application for determination of native title, compensation may be requested in a non-monetary form, and such requests must be considered by the other negotiating parties, who must negotiate the proposal in good faith (s. 79(1)).
6. In a non-monetary form, compensation may consist (without limiting other forms) of the transfer of land or other property or the provision of goods or services (s. 79(2)); the grant of a freehold estate in any land, or any other interests in relation to land whether statutory or otherwise (ss. 24BE(2), 24CE(2), 24DF(2));
7. It is subject to the overriding constitutional condition that it be on 'just terms' (though its content and application to non-compulsory acquisitions remains to be sorted out by the courts).
8. If based on a non-compulsory acquisition of native title rights and interests (for example, a mining tenement to which the non-extinguishment principle currently applies), then compensation may be determined by applying principles or criteria set out in relevant legislation under which the acquisition took place (referred to as the 'similar compensable interests test').
9. If particular provisions of the legislation do not meet 'just terms' compensation, the legislation provides that additional compensation is payable to ensure the 'acquisition is made on paragraph 51(xxxi) just terms';<sup>8</sup> and

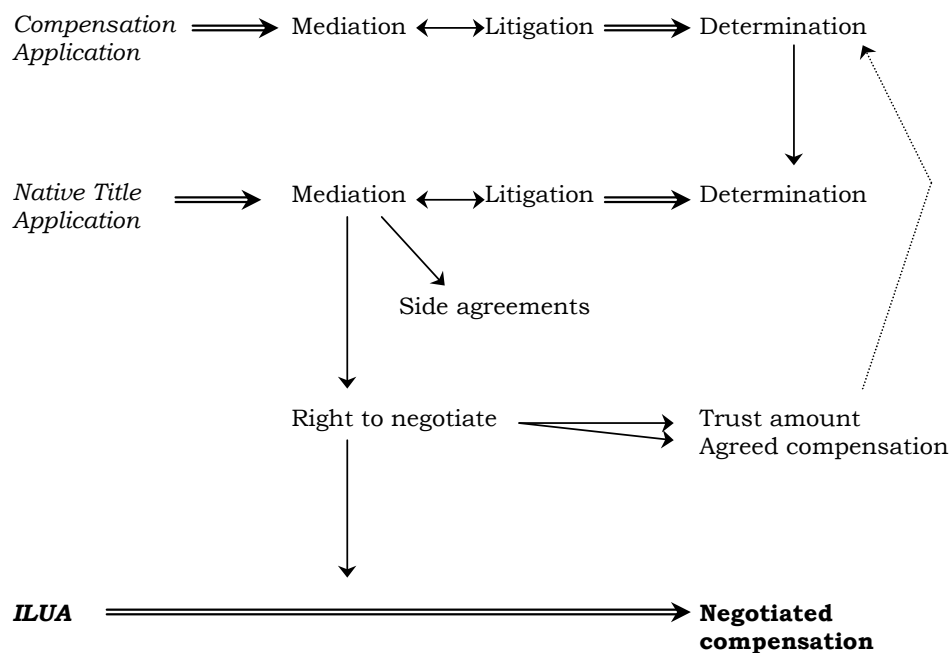
10. compensation is not payable for the extinguishment of native title during the period before the enactment of the *Racial Discrimination Act 1975*.<sup>9</sup>

### The multiple statutory pathways for native title compensation

There are five broad pathways under the Act via which native title compensation may be secured (see Fig. 1). These are:

1. an application for the determination of compensation, which may be either mediated or subject to litigation in the courts;
2. an application for the determination of native title, which may be either mediated or subject to litigation in the courts;
3. the negotiation phase of the right to negotiate where 'agreed compensation' may be secured;
4. the arbitration phase of the right to negotiate where an arbitrated 'trust amount' may be determined on account of any future liability; and
4. under Indigenous Land Use Agreements (ILUAs) in the form of negotiated 'compensation'.

**Fig. 1. Statutory pathways to compensation**



Under the last four pathways, compensation may be secured without a formal application for the determination of compensation ever being made. The third and

fifth pathways may lead to forms of compensation being secured without native title having been finally determined. And the first process—the formal claim for compensation—may be commenced without an application for the determination of native title having been made, but can only be secured with such a determination being carried out in parallel by the court. These different pathways for compensation call forth differently defined native title groups, invoke different principles and criteria, and may deliver compensation in different forms. The extent to which the specific rights and interests comprising native title must be regarded or proven also varies significantly from one pathway to another.

Importantly, the term ‘compensation’ is used throughout the legislation, but in different senses, and nowhere is it defined. It is also used interchangeably with other terms such as ‘condition’, ‘consideration’, ‘payment’ and ‘trust amount’—all of which have compensatory characteristics.

#### *Applications for determination of native title compensation*

When native title compensation is publicly discussed, the initial focus tends to fall on the formal claim applications made for the determination of compensation. However lodging such an application is only one of several pathways which parties may follow to consider compensation under the Act. To date, native title holders have been reluctant to make applications for determination of compensation and thereby acknowledge the possibility of extinguishment of native title (whether that be legal or cultural; see French 2000). Rather they have more energetically pursued lodging applications to secure a positive determination of their rights and interests as native title holders, and have been pursuing compensation by means of the other statutory pathways.

As at early 2001, some 32 applications for the determination of compensation have been made of which 22 are active. No determinations have been made, although a number have directions hearings set for the second half of 2001. In practice, the mediation of compensation applications referred to the NNTT by the Federal Court is proving to be extremely complex. For example, there are no statutory conditions laid down for calculating the actual amount of compensation; the extent of native title rights and interests and the identity of native title holders involved has to be identified case by case; and the nature and extent of any effect of an act upon native title, and the specific area of land or waters so affected has to be agreed upon. Unresolved questions of fact, and the early phase of common law development in respect to native title, mean that parties have been quick to seek a referral of compensation applications out of mediation and back to the court.

#### *Applications for determination of native title*

While applications for the determination of native title are not about compensation, as a matter of practice it appears that their mediated terms and conditions may include payments and conditions of a compensatory type. These may consist of monetary payments or the provision of in-kind benefits to the native title parties, including the transfer of land and the provision of services and



goods. These benefits can be negotiated without a formal application for compensation ever having been made. They may comprise part of the final mediated agreement forming the basis for the court's consent determination, or be obtained via side agreements that have been arrived at during the course of a claim mediation (in the latter case, before native title is determined) (See Fig. 1).

There have been 23 such determinations of native title of which 13 are consent determination since 1993, some of which may include conditions that have a compensatory purpose in their deeds of agreement. One of these, the Dhungutti native title determination, included the first major compensation payment made under the auspices of a native title determination, and not as a result of an application for compensation.<sup>10</sup>

The NNTT has additionally listed well over 500 'side' or 'ancillary' agreements which have been arrived at between parties in the course of mediation. Such 'side' agreements are essentially private and do not have to be registered. According to anecdotal evidence some contain compensatory conditions. Unfortunately, it is difficult to make any evaluation of the level or nature of compensatory conditions that might have been included to date in native title consent determinations of these 'side' agreements. Information about these determinations are held on the National Native Title Register as specified in s. 193(2), which at this stage it only includes the mandatory information elements identified in the legislation. Compensatory conditions, if they exist, are generally contained in the auxiliary Deed of Agreement that forms the mediated basis upon which a consent determination is brought before the court. These deeds are usually presented to the court as exhibits during proceedings and it is standard court practice to hand exhibits back to parties once a judgement has been made.<sup>11</sup>

### *The right to negotiate*

The right to negotiate procedure established under the future acts regime of the legislation provides an important statutory framework for native title compensation. The greatest volume of activity concerning compensation occurs in this arena. Under the right to negotiate, the consideration of compensation takes on a substantially different character than under mediation of applications for determination of compensation or of native title. The statutory principles and criteria are also different within the process itself, depending upon whether parties are engaged in the negotiation or arbitration phase.<sup>12</sup>

There are two broad types of compensatory payment to native title parties that might be secured under the right to negotiate.

- Firstly, the native title party's potential entitlement to 'payments' may be reckoned during the negotiation phase 'as a result of doing anything in relation to the land and waters concerned after the act is done' and parties must negotiate in good faith on the 'effect of the act on the registered native title rights and interests' (ss. 31(2), 33(1)). This first type of compensation consists of what might be called 'agreed compensation' secured during the

negotiation phase. Importantly, it may be secured before native title has been determined.

- Secondly, an eventual entitlement by native title holders to payments is initiated during the arbitration phase as part of 'conditions' about the doing of the act, set out in an arbitral determination that must take into account the 'effect of the act' on various specified native title rights and interests (ss. 36C(5), 38(1)(c), 39(1)(a) & (b), 52). This second type consists of a 'trust amount' determined under the arbitration phase on account of a future liability for compensation, which can only be paid after native title has been determined.

In addition to the above, a negotiated agreement or arbitral determination arrived at under the right to negotiate may be made subject to any other conditions to be complied with by any of the parties (ss. 31(1)(b)(ii), 38(1)(c)). In some cases, such conditions may also have a compensatory element.

It is difficult to analyse in any great detail the form and fairness of compensation being agreed to under the right to negotiate. As at February 2001, some 2,343 future act agreements have been made over mining acts and 57 over non-mining acts (1,128 of these have been expedited procedure agreements). Compensation is mentioned in 22 of those agreements, although the nature of the compensation or other details are not known to the Tribunal. Section 34 agreements are lodged with the NNTT. However in Western Australia where the majority of agreements have been made, the State Government uses a pro-forma agreement which generally does not include any details of the compensatory or commercial terms. If there is an auxiliary agreement which does outline agreed terms and conditions, the Tribunal does not generally obtain such information. In other words, there are likely to be considerably more than 22 future act agreements containing compensatory conditions.

To date, there have been no determinations by the NNTT of a trust amount as a condition of arbitration; although there has been considerable discussion of the criteria and principles which might apply in various future act arbitrations (see Sumner 2000).

#### *Indigenous Land Use Agreements*

The ILUA provisions are also tailored to provide an alternative pathway for parties to secure agreement over:

- the doing of future acts—either singly or in classes—including the possible surrender by the native title party of its statutory right to negotiate;
- dealing with future acts already done (including validating them), but not intermediate period acts;
- changing the effect on native title of a validated intermediate period act;
- dealing with compensation for past, intermediate period, or future acts;

- the relationship between native title and other rights and interests in relation to an area;
- the way in which native title and other rights and interests in relation to the area will be exercised;
- the extinguishment of native title by surrender to government; and
- any other matters concerning native title in relation to the area under negotiation.

Under the ILUA pathway, a form of negotiated compensation might be secured that is subject to different criteria than would have applied had it been negotiated under an application for compensation, or as ‘agreed compensation’ under the right to negotiate (see Edmunds & Smith 2000). Furthermore, the three types of ILUA—namely, Body Corporate Agreement, Area Agreement, and Alternative Procedure Agreement—have key differences.<sup>13</sup> These include the identity of mandatory parties, the subject matter of the agreements; and the procedures for registering them (see Lane 2001; Smith 1998). These differences mean that the ILUA procedure represents a distinctive pathway for compensation.

The ILUA provisions use a mix of terms including ‘compensation’, ‘consideration’ and ‘condition’. While compensation may be one of the conditions or considerations contained within such an agreement, ‘conditions’ and ‘considerations’ are not the same as ‘compensation’, which has a specific statutory reference under the ILUA framework; namely, negotiated compensation for ‘any past, intermediate period or future act’ (ss. 24BB(ea), 24CB(ea), 24DB(ea)). Unless the act consented to in the agreement is the surrender of native title, the non-extinguishment principle applies.

An advantage of the ILUA provisions is that, in a context where native title is unresolved and parties do not wish to give away legal rights of currently uncertain status—such as whether native title exists, or whether it is permanently or temporarily extinguished or impaired by certain statutory acts—they can nevertheless agree upon other more immediately actionable matters. An ILUA does not require that native title be bartered or exchanged for other benefits. Rather, an agreement could expressly state that it does not intend to permanently or partially impair or extinguish native title. It could also expressly recognise the existence of native title as a means of securing a party withdrawal and consent to the terms of any eventual determination. Extinguishment by surrender of native title, or surrender of the right to negotiate, can only occur when an agreed statement to that effect by the parties is included with an application for its registration.

Ten ILUAs have been registered with the NNTT. According to anecdote, a number contain compensatory conditions, though once again, the full terms and conditions are generally not available for scrutiny.

## The distinctive features of the statutory pathways

While native title compensation may be determined through court litigation, it can also be mediated, negotiated and arbitrated—and using different principles and criteria. Amendments made to the legislation in 1998 have also facilitated greater intersection between certain pathways, enabling different criteria and principles to be activated. Additional complex practices have arisen because the legislation does not only allow native title to be impaired, surrendered or extinguished, and compensated for those adverse effects. It also establishes, as McHugh noted (*North Ganalanja* (1996) 135 CLR 225) native title as a valuable right with an economic as well as spiritual and physical dimension. As a consequence, it can be used as leverage and traded during the course of negotiations by native title parties as a ‘right of consent’ (Humphrey 1999: 132; Smith 1996: 11), and may lead to them ‘obtaining a commercially beneficial settlement’ (McHugh, *North Ganalanja* (1996) 135 CLR 225).

These different pathways for compensation call forth differently defined native title parties. Under certain statutory procedures, the native title party that might secure compensation is restricted to the class of registered native title claimants and holders (for example, under the right to negotiate). In others, the native title party does not have to have passed the registration test in order to participate in mediation about issues including compensation; for example, under applications for the determination of native title or compensation. In contexts such as ILUAs, the parties securing compensation may include claimants who have not passed the registration test, persons who assert a common law native title right but do not have a claim lodged, and any other Indigenous persons. Under other pathways, the category of native title recipients of compensation may change from one phase of the procedure to another; for example, between the negotiation and arbitration phases of the right to negotiate.

Under pathways such as mediation and negotiation where ‘side’ agreements can be made, native title claimants might secure compensatory payments or conditions before any final mediated outcome has been agreed. Under the right to negotiate or ILUA pathways, negotiated compensation might be secured by native title claimants immediately upon registration of the agreement and according to its terms, and occasionally, even before that stage. Pathways such as arbitration and compensation applications require native title to be proven before receipt of compensation can occur by native title holders.

Not surprisingly, the extent to which the specific rights and interests comprising native title must be regarded or proven differs significantly from one pathway to another. For example, in order for an application for the determination of compensation to be made, there must also be a concurrent determination of native title including the relevant matters laid out in s. 86A. On the other hand, under the right to negotiate, while the native title party must have passed the threshold registration test, there is no requirement for native title to be determined nor any onus of proof on the native title party in that regard. Rather, the procedure is expressly built on the requirement that the parties and arbitral

body must assume the existence of the native title rights and interests entered on the Register of Native Title Claims. The NNTT in arbitration has argued, however, that the question of 'effect' is a matter of fact to be determined on the evidence in each case, and that there needs to be sufficient evidence to demonstrate which rights and interests will be affected and how (Sumner 2000: 86).

Under the ILUA compensation pathway, the native title party may include registered, unregistered and common law claimants, and there is no onus of proof or requirement for an evidentiary demonstration or determination either of native title, or of the particular rights and interests that might be affected. Neither is there any statutory requirement for investigation of what effect an act might have on the native title. These are matters within the consideration of the parties and, to the extent that the agreement is able to pass its registration process, may be treated as *prima facie*, or with consensual disregard.

The different statutory pathways chosen by parties may lead to compensation taking different forms. Even in contexts where the legislation specifies compensation must be in a monetary form, native title parties are also afforded a right to request it in any other form. As a matter of practice then, compensation under the various pathways of the legislation is comprised of a great range of forms (see case study examples discussed in Bridge 1998; NNTT 1999; Ritter 1998, 1999). These include:

- 'consent' cash payments;
- access, use and rental payments and conditions;
- negotiated profit sharing and joint venture arrangements;
- an arbitrated bond or trust amount;
- commercial and economically beneficial considerations;
- land;
- a wide range of in-kind commodities and services; and
- protective and symbolic conditions.

From a broad perspective, these can all be regarded as different aspects of the legislation's overall compensation regime, ranging across a practical continuum related to mitigation, restoration, reparation, recompense, agreement and benefit. Different forms of compensation may combine under certain statutory circumstances, so that a total agreement package often has multiple compensatory characteristics. For example, a compensation payment that may initially have been based on a more tightly defined 'adverse impact' approach, may end up also containing payment conditions that are 'consent related' or directed to beneficial socioeconomic development outcomes.

Consideration of native title compensation can occur in parallel, or intersect with, a number of discrete statutory procedures. For example:

- applications for the determination of compensation and for determination of native title may operate separately or intersect during mediation of shared issues;
- in the course of mediation, either type of application may be diverted into a partial or non-native title agreement under s. 86F, or withdrawn and diverted into an ILUA process (ss. 86A, 86B);
- compensation may be separately negotiated or arbitrated under the right to negotiate or under an ILUA without any other application being made for a determination of compensation;
- negotiation and arbitration of conditions that might include compensation may overlap under the right to negotiate;
- the right to negotiate may, in turn, be surrendered and proceeded with via an ILUA, where compensation for an act may also be agreed upon; and
- litigation of a compensation application may be adjourned by the court to enable further mediation of issues including compensation to be carried out.

Before choosing one pathway over another, parties need to consider carefully the impact that the different statutory principles and criteria applicable to each pathway will have on the conduct and outcomes of negotiations. Litigated compensation poses the problem of an externally imposed valuation of native title. The outcomes are unlikely to please any party. Negotiated compensation is consensually arrived at. It is processual rather than mechanistic in its methods; it affords native title parties the possibility of having their own compensatory preferences and criteria taken into account; and the terms of agreement are likely to be more sustainable into the future.

In the real world of mediation, negotiation, arbitration and litigation, parties are behaving strategically to render the legislation intelligible, and to maximise particular interpretations of, and outcomes from, the statutory compensation processes. In negotiation and mediation contexts, they are often doing so with little recourse to strict definitions, formulae or market valuation mechanisms. To that extent, the legislation's multiple pathways and lack of definitional clarity could be said to facilitate a degree of flexibility about native title compensation. While it might be analytically useful to demarcate 'adverse effect compensation' from other forms of rent-sharing, access fees, in-kind conditions and beneficial settlements that are being negotiated under the legislation, the multiplicity of statutory pathways and variety of negotiation practices make the validity of such a definitional distinction difficult to maintain.

The compensation principles and criteria set out under the statutory framework differ significantly from those relevant under Aboriginal law-based regimes of compensation. How then, can the loss or extinguishment of the inalienable Aboriginal possession of land be valued or reinstated in the face of what has been called 'bucket loads' of extinguishment, the forced taking of native title, and unwilling 'sellers'? The following sections draw together some of the issues

involved and explore possible options—from an anthropological perspective, and in light of the above accounts of the Aboriginal and statutory discourses about compensation.

### **Creating a recognition space for native title compensation**

[I]t is worth remembering that almost every legal development is, by definition, just a little unthinkable (Gray 1994: 207).

[I]ngrained habits of thought and understanding must be adjusted to reflect the diverse rights and interests which are under the rubric of ‘native title’ (Gummow J in *Yanner v Eaton* [1999] HCA 53 at 29).

A common feature of the statutory and Aboriginal discourses described above is that both are grappling with how compensation for native title might be appropriately conceptualised and valued. The proposition is advanced here that a more relevant holistic approach needs to be developed; and a new ‘recognition space’ created for native title compensation.

It is generally agreed that determinations of native title compensation (whether those be arbitral or court-based) will be based on an assessment of the specific native title rights and interests of relevant native title claimants and holders; and on the specific effects of an ‘act’ on their native title. In order for native title to be recognised by the common law, the ‘facts’ of native title have to be determined through translation from one cultural domain (Aboriginal law and custom) to another (the Australian common law). It is important, therefore, to ascertain what appear to be the current limits of that common law translation.

The translation problems involved are not new; there is a long experience of them under the *Aboriginal Land Rights Act (NT) 1976* (ALRA). Many of the same difficulties are arising in the native title arena. Justices Deane and Gaudron accepted in *Mabo (No 2)* that it is correct to assume that ‘the traditional interests of the native inhabitants are to be respected even though those interests are of a kind unknown to English law’ (1992, 175 CLR 1 at 85). Justice Brennan went so far as to argue that ‘the general principle that the common law will recognise a customary title only if it be consistent with the common law *is subject to an exception in favour of traditional native title*’ (*Mabo (no. 2)* (1992) 175 CLR 1 at 59, emphasis added). The extent of that exception is uncertain and still being explored.

As the High Court noted in *Fejo v Northern Territory* ((1998) 156 ALR 721 at 737), because native title is recognised by the common law, there is ‘an intersection of traditional laws and customs with the [Australian] common law’. Indigenous lawyer, Noel Pearson (1996: 5–6), has referred to native title as a ‘recognition concept’ created at this intersecting space between the two systems of law where there is recognition. Native title is then, the ‘recognition space’ between two laws. The preferable approach to determining the content of common law native title, according to the High Court, is ‘to recognise the inappropriateness of forcing the native title to conform to . . . common law concepts and to accept it as *sui generis*

or unique' (*Mabo no. 2* (1992) 175 CLR 1 at 89, per Deane and Gaudron JJ). And, as Justice Gummow's comment in the *Yanner* decision, quoted above, suggests: 'ingrained habits of thought and understanding must be adjusted'.

Accordingly:

- the current nature, content and survival of native title must be ascertained as matters of fact, by reference to the laws and customs of the people of the relevant territory or locality;
- native title will vary from one region to another and will need to be determined on a case by case basis; and
- native title constituent title rights, interests and responsibilities may have no equivalent to incidents of legal estates and entitlements in land under Western law.

Arguably, similar conclusions can be made in respect to native title compensation. It also is *sui generis* and unique—its principles and precedents may be unknown to, and have no analogous legal right or interest under, the common law. It may, therefore, similarly subject to an exception in its favour.

Native title, having its origin and content 'derived solely' under Aboriginal law and custom, also includes *Aboriginal* principles, concepts, processes and values of compensation—and these compensatory regimes are fundamentally relevant to the rights and interests of native title holders in land and waters. Accordingly, there will be a similar intersection between Aboriginal laws and customs of compensation relevant to native title, and the Australian common law of compensation. There should also be a corresponding 'recognition space' within common law recognition, for the Aboriginal rights and interests of native title compensation.

As with native title, native title compensation will require an innovative jurisprudential approach that acknowledges it to be a fundamentally new creature, belonging to the native title recognition space. It is, therefore, legally ethnocentric and reductionist to equate native title compensation rights and interests either to Western property law concepts and precedents, or to market land valuation methodology.

A number of conclusions follow. First, the conventional principles of 'special value' to the owner, or 'solatium', will be of little if any direct applicability when trying to assess the 'value' to native title holders of their native title for the purposes of compensation. Second, freehold market value does not provide a notional limit for that culturally-based value nor for the losses of past, current and future generations. Third, there will be little relevance in using the area of land as a basis for measurement: a small area of waste land may have a 'big' site on it, or a Dreaming track passing through. Nor can the frequency of exercise of a right or responsibility be used as a measure: a major ceremony may only be conducted once a year or decade. Fifth, the analytical division posed by some writers (see Whipple 1997) between the so-called 'material' and 'non-material'



aspects of native title is spurious, and misrepresents the culturally-based facts of compensation under Aboriginal law. The spiritual, economic, social and corporeal domains of Aboriginal life are seen as indivisible, and posed upon a fundamental connection with land. Aboriginal principles and processes of compensation are built upon the same paradigm.

Native title compensation is best viewed conceptually as a multi-dimensional package whose form and purpose reveal the distribution of social (and legal) relations and entitlements, and of value preferences. To pursue a strict definition of compensation ignores the variety of forms it is actually taking in practice, and importantly, ignores Aboriginal evaluations of what constitutes native title and appropriate compensation.

The new recognition space for native title compensation will expand and contract as courts deliver their judgements and parties negotiate outcomes. At the heart of that space however, one principle should remain constant: that native title constitutes a proprietary right, and its extinguishment amounts to an acquisition of property (Deane and Gaudron JJ in *Mabo (No 2)* (1992) 175 CLR 1 at 111; 107 ALR at 84). Measuring the value of native title for the purposes of compensation, especially in the context of formal applications for the determination of compensation, will focus on what kind of property right it is and, in particular, what constitutes 'property', 'loss', 'extinguishment' and 'just terms'. While there will continue to be contending evaluations of these concepts, in legal, economic and other forums across the world, a more 'socially oriented vision of entitlement is starting to emerge' (Gray 1994: 207). Such a trend is well suited to creating a recognition space for, and facilitating practical outcomes from, native title compensation.

Of concern, however, is the extent to which the common law will be capable of stepping outside its own ethnocentrism, in order to recognise native title and native title compensation as it is conceived of and practiced under Aboriginal law and custom. The essential challenge to the common law, one raised by the High Court itself at different times, is that 'ingrained habits of thought and understanding must be adjusted'—'habits' more critically characterised by Brest (1982: 765) as 'the self-congratulatory and complacent reign of the legal process'.

Common law recognition and valuation of native title for the purposes of compensation will require an expansion of 'the borders of the legal imagination' (Macklem 1991; see also Davis 2001; Grattan & McNamara 1999; Pask 1993) and a more critical jurisprudential reflection on the common law's conceptual separation between its own legal 'Self' and the 'Other'. The 'common' aspect of the common law does not seem to readily admit other legal values and practices which currently comprise multicultural Australia. As Brest (1982: 770–3) has pointed out, given that the demographic of the legal 'interpretative community' reveals a group of mostly 'white, male, professional, and relatively wealthy' exponents, then the interpretative rules themselves and the authoritativeness of outcomes of the common law respond to that demographic. The 'recognition space' or 'intersection' existing between Aboriginal law and Western law could

thereby be constrained to a significant degree—‘much of our commitment to *the* rule of law really seems a commitment to the rule of *our* law’ (Brest 1982: 772; see also French 2000).

But arguably, common law rules and Australia’s native title legislation do not, as French appears to propose ‘form the universe of discourse within which indigenous people ... must operate’.<sup>14</sup> Aboriginal land owners are not mute, without a discourse of their own about law, property, and the value of inalienable possessions. Hopefully, under the ‘common’ law development of native title that is now being carried out, Indigenous Australians can do more than simply bring their ‘special knowledge and insights’ to bear in native title compensation cases.

## Native title as cultural property

The essential nature of property is to be found in social relations rather than in any inherent attributes of the thing or object that we call *property*. Property, in other words, is not a thing, but a network of social relations that governs the conduct of people with respect to the use and disposition of things (Hoebel 1966: 424).

[W]hatever absolute criteria of property may be set up, the ultimate determinant of what is property and what is not is to be sought in the attitude of the group from whose culture a given instance of ownership is taken (Herskovits 1965: 326).

[I]t is possible to speak of loss in relation to the notion of kinship and belonging rather than possession. I suggest that the relationship implied by cultural property rights may be a form of belonging as well as a kind of possession ... the concept of cultural property rights can help to identify the referents of indigenous discourse about culture loss (Kirsch 2001: 169).

In light of the complex dimensions of property highlighted in the above quotations, and given native title is a property right, there is unlikely to be any fast-track or single formula for the calculation of native title compensation. Indeed, echoing Herskovits’ sentiment, the Preamble to the legislation (Part 1, Preliminary, section 1: 2) states that: ‘Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to *negotiate its form*, must be provided to the holders of native title’ (emphasis added).

New concepts of property and ownership are needed to deal with the Aboriginal realities of native title, and with the Aboriginal right to negotiate the form of compensation that might flow from extinguished, lost or impaired native title property entitlements. To gain a wider perspective of concepts of ‘property’ and ‘ownership’, Kevin Gray (1994), Professor of Law at the University of Cambridge, imagined a virtual meeting with visiting Martians bent on researching the terrestrial concept of property in order to ‘look afresh’ at the ‘terrestrial concept of property’ (1994: 157). Gray need not have resorted to science fiction. He needed only to examine the Australian common law’s ongoing ‘encounter of the third kind’ with the alien notion of ‘native title’. The ongoing debate generated by that encounter highlights some critical issues relevant to considering what kind of property right native title is.

Over the last decade, Gray (see 1991, 1994; and also Gray & Gray 1998) has attempted a worthy expansion of the notion of property beyond that of the 'insistent allocation of private rights of ownership', to that of 'equitable property'—where property is the name given to a legally (*because socially*) endorsed constellation of power *over* things and resources' (1994: 160; emphasis added). It is 'a socially approved power relationship in respect to socially valued assets' (1994: 160). His formulations have been influential in High Court thinking (see McIntyre 2001), but as the quotations above suggest, they are not necessarily new outside the legal arena.

As several commentators have noted, we tend to think automatically of property as the thing or resource which is owned (see Hann 1998; Herskovits 1965; Hoebel 1996; Kirsch 2001; Radin 1982; Strathern 1996, 1999). The need to overcome the 'thingyness' of property has seen researchers emphasise the importance of both 'soft' and 'hard' property; that is, its 'innominate and anomalous interests' as well as its objective referents (see Kirsch 2001; Weiner 1992; and Dixon J in *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 349).

As Hann (1998: 1–47) succinctly poses it, property is embedded; it is 'actually a form of sociality', a 'distribution of social entitlements'. But furthermore, property is also a 'way of knowing'; it comprises the systems of knowledge, ideas, practices, connections to place, and beliefs about particular areas of land, that legitimate rights of ownership, access and use of it (Anderson 1998: 69). Justice North in *Western Australia v Ward* ((2000) 170 ALR 159 at 354–6, referring to Gray & Gray 1998: 27) adopts the analysis of Gray and Gray that the idea of 'property' oscillates between the behavioural, the conceptual and the obligational, between competing models of property as a fact, property as a right and property as a responsibility. In the *Yanner* decision ((1999) HCA 53 at 17), Justices Gleeson, Gaudron, Kirby and Hayne argue that 'an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land'. In their entirety, these core attributes of native title arguably constitute what Kirsch (2001) and others refer to as 'cultural property'. This understanding of native title as a cultural property right challenges Anglo-Australian concepts which are constrained by a commodity logic that detaches persons and things (see also Rose 1994: 296).

The ethnographic literature, the record of native title claim documents, and negotiation and court proceedings make clear that, for Aboriginal Australians, native title as cultural property encompasses not only land and waters and its places, sites and resources, but also the songs, stories, knowledge, ritual and ceremonies, kinship systems, art, the law and the Dreaming that are connected to land and waters, and the distribution of social relations and entitlements vested in them. The responsibilities which flow from that distribution are encapsulated in Gray's (1994: 163) idea of rights of property resulting in stewardship that is derived 'from conscientious obligations to deal with an asset or resource in a certain way'. For Aboriginal groups, obligations and stewardship in respect to land are derived from Aboriginal law. Aboriginal ideas of native title as property

are best constituted as cultural property for personhood and for grouphood; an inalienable possession.

The core characteristics of Aboriginal views of property—its inalienability, the stewardship involved, the interdependence of social, spiritual, economic and legal attachments, of its ‘soft’ and ‘hard’ components—have direct implications for how native title should be valued for the purposes of compensation. In so far as ‘equitable property is commensurate with equitable relief’, the beneficial entitlement of native title requires the need for ‘just terms’ in respect to both *process* and *outcomes*. The concept of native title as cultural property can be used to identify the Aboriginal referents of value and loss caused by the taking of inalienable possessions, and of what might constitute appropriate compensation processes and outcomes.

### **Just terms compensation for native title as cultural property**

In respect to valuing native title as cultural property, compensation on ‘just terms’ seems to be the governing statutory issue.<sup>15</sup> ‘Just terms’ compensation underpins the determination of quantum for acts of States as well as acts of the Commonwealth Government. This means that while States are not obliged to give compensation on just terms for impairment or extinguishment of other sorts of property, they are obliged under the legislation to give just terms compensation for any impairment of native title.

The nature of the loss, impairment or extinguishment of native title will be the basis for determination of compensation. This means that the nature of native title as a cultural property right, and the common law’s capacity for recognition of that proposition, will be fundamental. The courts are still in the thick of the debate about whether the common law recognises the full extent of the relationship with the land as it is perceived to exist and be exercised by Aboriginal people themselves (called ‘spiritual connection’ by the majority of judges in the *Ward* decision and ‘organic title’ by Gleeson J in argument in that case in the High Court), or whether it will be read down as constituting only a ‘bundle of rights’.

In attempting to broaden the common law consideration of native title, French (2000: 10) makes an important distinction when he points out that common law or legislative extinguishment is a legal metaphor for the ‘rule of limitation or qualification of the recognition’ of native title. In its legal form, he argues, extinguishment can be said to comprise a separate category, in distinction to that of the lived reality of Aboriginal people (where extinguishment of another category might separately occur as a matter of cultural fact). Of course, in the real world, legal extinguishment does not remain quarantined from having its own impact on Aboriginal groups. The longer history of land rights in the Northern Territory attests to the symbiotic relationship that developed between Aboriginal land ownership and the workings of the ALRA (see examples by Smith and other authors in Hiatt 1984). In other words, non-recognition by the common law, or

legal extinguishment, may have the more pernicious effect of facilitating actual extinguishment or impairment of the cultural, spiritual and social aspects of native title as a lived experience. When legal and/or cultural extinguishment occur—when inalienable cultural property is treated as detached alienable property—the quantum of compensation sought by native title holders is likely to be extremely high (perhaps onerously high for governments), and the interpretation of ‘just terms’ will be a critical factor.

If native title is recognised by the courts in a restricted sense of bundles of rights that can be desegregated, it may be that native title will be easy to extinguish legally. If native title is recognised by the common law in its fullness—as an inalienable cultural property right for personhood and grouphood—it may not be easy to extinguish legally. In that event, most compensation may well be for impairment and diminution, rather than loss and extinguishment. Then, the quantum sought is likely to be based on the value of restricted Aboriginal access and use rights for particular periods, after which native title rights and interests might resume or be restituted (as currently seems to be the case for mining tenements where the non-extinguishment principle applies, at least in the legislation). In these circumstances, ‘just terms’ may refer not so much to the quantum sought, as to what might comprise the means whereby rights and interests are able to be later re-asserted.

The High Court has stated that ‘just terms’ be given a liberal construction and that it requires meeting a standard of justice amounting to ‘fair dealing’ (see *Nelungaloo v Commonwealth* (1952) 85 CLR 545 at 6000, per Kitto J). This suggests that ‘just terms’ should apply to the process of determining or negotiating compensation, not simply to the end product.

‘Just terms’ compensation will require a full consideration of the *sui generis* nature of native title, and such related intangibles as cultural loss and the inherent inalienability of native title under Indigenous law and custom. The NNTT in arbitration has rejected the idea that ‘the rights and interests of native title holders are artificially converted to freehold rights and that the peculiar features of native title are to be ignored’ (Re *Koara People 1* (1996) 1312 FLR 73 at 88, per Seaman, Smith & Macdonald; also *Western Australia v Thomas* (1996) 133 FLR 124 at 189, per Sumner, Neate & O’Neil). The NNTT has argued that the word ‘enjoyment’, referred to under s. 39 arbitral criteria, implies making an assessment of the effect of an act on present usage and future amenity (*WMC Resources, State of WA, Evans (Koara People)* WF99/4; Sumner 2000: 85). Neate (1999: 80) has argued that the compensation payable under s. 51A of the legislation is not generally limited to market value, but extends to compensation for severance, injurious affection, disturbance, special value and solatium or other non-economic loss.

Compensation will fail in such terms if it is based on a reductionist equivalence to freehold title or market value. ‘Just terms’ will also require regard to be had to the *sui generis* nature of Aboriginal compensatory regimes and the related rights, interests and stewardship operating under their own law and customs. The

measure and form of 'just terms compensation' will need to be based on ascertaining the concepts, value and wishes of native title holders. They are likely to hold a different interpretation of the purpose of compensation, and what will constitute appropriate recompense, mitigation or restitution. Some forms will be more, or less, appropriate. For example, the right 'to negotiate *the form*' of compensation may, from a native title group's perspective, operate according to a scale of diminishing returns where, at one end of the spectrum of effects, extinguishment is regarded as being beyond monetary compensation. The earlier discussion of competing evaluations evident between Aboriginal modes of discourse about compensation and those of Western legal discourses, indicates there may be a fundamental incommensurability between what is taken away when native title is extinguished, and what might be given back in the form of compensation. For mutual equivalence to be secured, it will be the Aboriginal value of native title as a cultural property right—of which they may have been legally deprived—which must be made good by compensation.

At first glance there appears to be a statutory preference for compensation to be in monetary form. Given the Aboriginal value attached to land as an inalienable possession, its equivalence to a monetary form must represent a reading down of those values. However, there are statutory procedures whereby cash can be converted to other forms of compensation, and native title groups are clearly looking for packages of compensation that combine monetary and non-monetary forms. In a recent case, native title claimants to a right to negotiate agreement over the Eastern Gas Pipeline in New South Wales sought and obtained an interlocutory injunction against the company involved for breach of agreement conditions for monitoring land disturbance and site protection (Phillips 2000). The claimants successfully argued in court, and Justice Young stated, that it was clear that financial compensation for the lost opportunity to exercise the culturally important traditional role of site monitoring and protection would not be an adequate remedy.

The issue of the adequacy and form of compensation is not new, or specific to the native title arena. During the inquiry which led to the enactment of the ALRA in the Northern Territory, Justice Woodward (1974: 10) argued that 'cash compensation in the pockets of this generation of Aborigines is no answer to the legitimate land claims of a people with a distinct past who want to maintain their separate identity in the future'. He believed that 'the only appropriate direct recompense for those who have lost their traditional lands is other land—together with finance to enable that land to be used appropriately' (1974: 10).

'Just terms' suggests that it is proper that a court determination of compensation should, minimally, address the native title group's future means for maintaining a cultural identity in the face of statutory extinguishment. Such an approach abides by the fundamental principle of awarding damages: namely reinstatement—restoring plaintiffs to the position they would have been in had the negligent injury not occurred. That would require value to be assessed on a 'full compensation' basis, taking the form of a general damages award. Such an

award would have to be based on considering the intrinsic value of native title as cultural property and its value to Aboriginal owners for their own special purposes (see also Garnett 1998; Gobbo 1993; Lavarche & Riding 1998; Neate 1999; Orr 1997).

Just terms compensation for extinguishment might mean, as arguments by Woodward and Gray imply, that reinstatement in circumstances of extinguishment over an area of native title land could only effectively be achieved by providing native title holders with inalienable freehold over other areas of land for which the group also asserts native title (and where legal extinguishment has not occurred). That may well require 'confirming the right of the indigenous peoples of Australia to reconstruct their traditional relationship with their country' (Gray 1994: 186–7).

For the purpose of considering what might constitute aspects of cultural property for the purposes of native title compensation for extinguishment, a culturally-informed 'Heads of Damages' is outlined below. This lists key domains of potential cultural loss for which logically probative facts would need to be considered.

### **A Heads of Damages for native title compensation**

The general rule in the law of torts (civil injury) is that a person will be compensated for all losses suffered as a result of the action which has been committed against them. Torts law has 'Heads of Damages' (Heads) which are the broad categories of types of losses for which the claimant may seek compensation. The Heads are intended to reflect the losses which society recognises as resulting from a tort. This paper argues that a new Heads needs to be developed for native title rights and interests (see also Garnett 1998; Neate 1999). These Heads would be based on native title as a cultural property right, and the categories of loss would be wider than the framework currently afforded by a torts claim for loss. A native title Heads will need to reflect individual and collective losses, inter-generational loss, and the loss of inalienable possession of cultural property in both its 'soft' and 'hard' dimensions. If native title compensation is *sui generis* then 'just terms' as both equitable process and outcomes for the extinguishment of native title will need to be informed by the content and value of the title to its dispossessed owners. Some guidance as to the content of a Heads can be taken from the Aboriginal compensation principles and criteria which have been described above. It is not surprising that these are routinely invoked by native title claimants in the course of mediation and negotiations about their native title.

A Heads for compensation would encompass the effects of an act on the native title holders' capacity and responsibility for, interests in, and rights to maintain and reproduce the following:

- inalienable affiliation to land and waters;
- possession, use, access, enjoyment and protection of those land and waters;

- sociality and social relatedness (including corporate identity, family life and parenting, marriage, kin systems, birthing and mortuary practices, social capital);
- systems of traditional governance, authority and decision-making;
- a religious life (including life cycle initiation stages, a corpus of religious beliefs and practices, personal and group relationships with the spirit world and creators, etc);
- an individual and group cultural identity and way of life (including language, socialisation, traditions, intellectual and artistic capital);
- economic structures and way of life (including exchange, distribution and sharing, means of production, barter);
- physical and psychological health and wellbeing; and
- future succession and generational native title rights, interests and responsibilities in land and waters.

It is worth noting that there is a certain congruence with a number of these proposed Heads criteria and the broad s. 39 criteria set out under the legislation for making arbitral body determinations. These include the effect of future acts on native title holders' enjoyment of their registered native title rights and interests; on the way of life, culture and traditions of any of those parties; the development of their social, cultural and economic structures; freedom of access to the land or waters concerned; and freedom to carry out rites, ceremonies or other activities of cultural significance.

## **The lessons and challenges for compensation policy and practice**

For Aboriginal people, there is a fundamental qualification to their engagement in seeking compensation. It is being played out in the context of the statutory extinguishment and forced taking of native title by government. They are not willing sellers, and the compensation they may be seeking is based on effects over which they have no right of veto. Aboriginal objectives in participating in the negotiation or court determination of native title compensation will be coloured by their own criteria, preferences, and measures of outcome.

For the parties involved in negotiation and mediation, as opposed to court litigation, the consideration of native title compensation is becoming the vehicle for developing other kinds of social and economic relationships. In the process, contending values and objectives have to be settled to mutual satisfaction. To do so, a number of practical challenges are arising, and some old policy lessons are re-emerging.



### **The problem with static compensation**

A challenging issue for all parties is the sustainability of compensation agreements over time. It has become apparent, over the 25-year period the ALRA has been in operation in the Northern Territory, that the impacts of resource development do not all occur at the same time. Impacts can be ongoing, may occur in stages, or build up componentially, or be short-lived. Different types of impact may affect different generations of native title parties. This perspective of impact as an evolving state is entirely in accordance with Aboriginal views. Arguably, compensation terms and conditions should address equity within the native title party over time.

Gray (1994: 189–90) points to the Weiss (1989) argument for ‘intergenerational equity’ whereby each generation is burdened by an obligation of trusteeship to conserve the quality and diversity of the natural and cultural resource base for future generations. The same notion of guardianship or stewardship for future generations is found in the Aboriginal concept of ‘looking after’ the land. Justice von Soussa (in *Bulun Bulun v R & T Textiles Pty Ltd* (1998) no. DG3 at 529) characterised this relationship legally as a ‘fiduciary duty’ because of the ‘trust and confidence’ to preserve knowledge by guarding it against infringement.

If compensation under the legislation is, first and foremost, for an effect on native title, and given native title is a property right transmitted across time to succeeding generations, then compensation for ongoing effects must, in fairness, also be available to those future generations for future effect. If the extinguishment of native title constitutes cultural loss of ‘property for grouphood’, that argument is all the more persuasive when, as Moustakas (1989) points out, future generations are unable to consent to transactions that threaten their existence as a group. For that reason, compensation should include a loading for inter-generational equity.

The alternative to a current loading is that compensation could be staggered by developing conjunctive conditions for its assessment over the life of an act. Staggering the negotiation of compensation might not satisfy the needs of any party for current certainty about the exact total of compensation, especially when that amount could effectively constitute a final cap on compensation. On the other hand, such an approach would have the advantage that the total amount of compensation could be more directly linked to actual impacts (positive or negative); be informed by ongoing impact assessment; and be distributed to the persons actually experiencing impacts over the life of an act. It might also ensure that native title parties would have benefits remaining, to enable them to deal with the later ‘closure’ of a resource development project, and the need to re-establish access to, and use of, the land involved (Altman & Smith 1994).

### **Distributive equity and spread**

Several writers have noted that perhaps one of the greatest impacts of resource development has come from the provision of compensation itself (Altman 1983; Altman & Smith 1994; Smith & Finlayson 1997; Turnbull 1980). Howitt’s (1991:

133) conclusion that the distribution and application of income from mining on Walpiri country in the late 1980s 'has the greatest direct impact on [their] social relations' and 'creates considerable social disruption . . . [and] constant discussion and disputation', is also being documented by other researchers in the native title arena.

A major weakness in the native title statutory framework is that there are no guiding principles to direct consideration of the twin issues of distributive equity and distributive spread. Distributive equity focuses on the issue of how to ensure that compensation benefits are directed towards the 'right' native title party and equitably to all the members of that party—within the group and over time. Distributive spread refers to the issue of whether equity entails a more inclusive list of beneficiaries than just the native title claimants or holders. For example, should the wider Indigenous community within which native title claimants reside, or others who might be affected by the doing of an act, be included as beneficiaries of compensation? In the native title arena, these matters have been the cause of considerable conflict.

Under the logic of inclusiveness that has been described as informing Aboriginal thinking about the social boundaries of compensation, the effect of an act upon native title will invariably be seen to include more people than the native title holders. As noted earlier, not all Aboriginal relations, things and people are conceived of as being equal. Just as Aboriginal interpretations of the cause and effect of actions are based upon identifying the radiating social fields, so the way compensation is subsequently distributed will be subject to the same pressure to identify concentric rings of 'affectedness' and to privilege certain categories of relations (pers. Comm. P. Sutton; see also Altman 1997; Altman & Smith 1994; Smith 1984).<sup>16</sup>

Differing degrees of rights and interests in land, which Sutton (1998b) has characterised as 'core' and 'contingent', are often reflected in distribution arrangements. In that sense, 'unequal' distributive spread could be seen as a legitimate reflection of the internal ordering and distribution of Aboriginal land entitlements. But it might also simply be the result of inadequate, fast-track consultation. For example, the inclusiveness or exclusiveness of negotiation processes with native title groups about compensation can create privileged interests and rights. These are influential when later identifying the beneficiaries of any compensation. People excluded or overlooked in the initial phase may have their subsequent native title compensation rights and interests disadvantaged. Others have their position legitimised and, in some cases, enhanced over others.

There are discernible trends and lessons that should be heeded from the earliest days of implementing compensation arrangements under the ALRA, regarding how the social boundaries of impact and beneficiary groups are defined for the purposes of distributing compensation (see Altman 1983, 1985; Altman & Smith 1994; Smith 1984: 94–100; articles in Smith & Finlayson 1997). One important lesson is that distribution equity and spread should be addressed before

compensation agreements are signed off, not after. Another is that the wide distribution of monies to 'affected people' in the Northern Territory has led to immigration by Aboriginal people to 'high' royalty and compensation areas. As a result, compensation monies have become thinly spread and less effective, and conflict has been exacerbated by contested rights to membership in beneficiary groups. Excessive distributive spread and subsequently large membership lists of royalty associations in the Northern Territory, has led membership becoming more tightly defined once agreements are actually implemented. In one notable case, over a period of some 15 years, membership in a royalty association was reduced from over 1,200 to 80 beneficiaries (Altman & Smith 1994). This belated exclusiveness in distributing compensation has generated conflict, especially as compensation monies run out and services are cut. Over time these tensions have caused seemingly successful agreements to become unworkable, and led to poor outcomes from compensation. Similar issues are occurring in many native title negotiations.

There are grounds for considering whether there are better means of managing and distributing compensation payments. It is in the interest of all parties that compensation packages developed under any statutory pathway should clearly identify the full set of beneficiaries; the extent to which benefits are to be more or less widely distributed; the principles upon which distribution decisions have been (and are to be) made; and the mechanisms to resolve any dispute about distribution. Given that Aboriginal law-based regimes for compensation are fundamentally based on an ongoing process of negotiating the social boundaries of the fields of instigation and effect, it is not surprising that this way of operating permeates every negotiation about the distribution of native title compensation.

There are equally good grounds for suggesting that a certain proportion of all native title compensation should not be secured until native title is determined (as occurs under the arbitration phase, or with a formal application for compensation). That proportion could remain undistributed and be invested for use by later generations of beneficiaries. Similarly, the many one-off payments of negotiated compensation may be more effective if pooled into a single regional or community fund, administered by a regional representative agent (for example, a native title representative body, a prescribed body corporate or a newly established regional native title compensation association). There is a well-documented case for recommending that the immediate distribution of cash compensation does little, in the end, to address the effects of a future act upon native title, especially if land is not included in the package.

### **The issue of substitution compensation**

The native title legislation facilitates a degree of flexibility in the negotiation of compensation, and native title claimants behave strategically to secure compensation in a form relevant to their needs. But there is also the potential problem of what might be called 'substitution compensation' (see also Altman 1997; Altman & Pollack 1998).

Substitution compensation is a complex matter and again raises the fact that there are competing evaluations as to what comprises appropriate compensation. It arises where compensation includes the substitution of cash with goods and services that should—according to Commonwealth Grants Commission funding considerations—be generally accessible to all citizens. One perspective of this issue is that native title claimants or holders who accept compensation in the form of housing, infrastructure, health services, municipal services such as water or power, and so on, are accepting substitutes which should already be provided on an equitable basis by government as part of its delivery of essential services to all citizens. They are thereby receiving less compensation than they otherwise might. From this perspective, it is not at all clear that substitute commodities and services should actually be called ‘native title compensation’.

The fact is, however, that the legislation encourages substitution by establishing a broad equivalence between monetary payment, and other ‘goods and services’ to which cash can be transformed (ss. 79(1) and (2)). This substitution may not immediately be problematic for native title groups. As noted, the expectations and objectives which native title groups bring to bear on negotiations mean they may prefer the provisions of such goods and services. The difficulty with justifying such substitution is that native title groups often participate in negotiations from a position of marked economic disadvantage. Substitute goods may appear to assist in overcoming such disadvantage. Unfortunately, this outcome is unlikely: substitution compensation is invariably not based on an agreed recurrent provision of services, but is a ‘one-off’, or lasts only the life of the agreement. Case study evidence from the operation of royalty associations in the Northern Territory also suggests that a piecemeal approach to providing remedial government-style services has in fact not overcome the underlying economic disadvantage of traditional owners (Altman 1996; Altman & Smith 1994). The more astute, long-term investment and pooling of cash does seem to be generating a more sustainable pool of resources for use by current and future native title generations.

When securing goods and service as a component of compensation, native title groups will have to weigh up the balance between substitution issues, their economic and social goals, and the effect on their capacity to transmit cultural property. Preferably, substitution compensation should play a minimal role.

### **The need for transparency and benchmarks**

There are currently no statutory criteria or benchmarks for evaluating the terms and conditions of compensation agreements or determinations, or for monitoring compliance with them. Negotiated agreements such as ILUAs, future act agreements, and mediated consent agreements in respect to applications for native title or compensation, are required to be lodged either with the Federal Court or various registers operated by the NNTT. But these statutory requirements are minimal. In respect to NNTT procedures, parties invariably only register the signed cover page and not the underlying deed of agreement.

Where full agreements details are produced as exhibits to the court for the purposes of a determination of compensation or native title, the deed documents are returned to parties and so are not publicly available. The result is that perhaps the most accessible debate about the whole issue of compensation, along with information about various terms and conditions, are to be found in NNTT arbitration transcripts and final arbitral determinations (see Sumner 2000).

Nor are the detailed terms and conditions of side agreements negotiated under the Act publicly available. Apart from anecdotal reports, it is not even possible to tell which agreements might include compensation as a condition, let alone to evaluate the form or outcomes.

At the heart of any call for greater transparency in compensation agreements lie alternative interpretations of whether the compensation is private (hence there is no requirement to be open) or public (hence there is a public interest in greater scrutiny) (similar arguments have been considered under the ALRA by Altman 1985, 1998; Levitus 1999). Whatever the outcome of that debate, the lack of transparency contributes to inadequate monitoring of compensation payments, obstructs independent evaluation of terms and conditions, and limits the development of benchmarks for how compensation might be better measured, distributed and managed.

There is considerable public and policy attention paid to the accountability of native title parties for their receipt of compensation. By contrast, there seems to be little attention given to monitoring the compliance and accountability of other parties (including governments) with the terms of compensation agreements or determinations. If compensation is supposed to bring about an improvement in the social, economic and cultural circumstances of native title groups, then one can only conclude that it is currently impossible to ascertain whether positive outcomes are being achieved. Assertions of 'commercial-in-confidence' sensitivities are a poor justification for the resulting lack of scrutiny.

A more systematic and transparent approach to these issues is required. One option could include giving native title representative bodies a statutory role to:

- evaluate the terms and conditions of any compensation payments;
- monitor the implementation of all negotiated agreements including compensation;
- provide independent financial advice to native title groups about compensation; and
- publicly report on these activities.

Such bodies might be able to facilitate a more coordinated regional approach to the negotiation of compensation, establish mechanisms for pooling small one-off payments at a regional or community level, and develop regional benchmarks for appropriate forms and measures of 'just terms'.

### **Taxing compensation**

Another emerging and complex policy issue is that of the potential taxability of native title compensation. Once again, it is not a new issue under the ALRA and in other State land rights arena, and it highlights the competing evaluations of the parties involved. In the process of amending the legislation in 1998, the Commonwealth Government announced it would contribute 75 per cent of the compensation costs of State and Territory Governments that might arise out of future act and intermediate period acts (see Commonwealth of Australia 1997: 10).

There has been little public scrutiny to date as to how this arrangement has been carried out, or what its impact has been on native title mediation and negotiations. If native title groups increasingly turn to seek compensation for extinguishment and loss, and if just terms compensation requires full damages or reinstatement, then government may find itself facing an expanding compensation bill. One lesson to be learnt from countries such as Canada is that litigation usually costs more than negotiation and, better still, that active protection of the cultural property rights of Indigenous people limits the need for compensation remedies.

A recent Federal Government initiative is the proposal to impose new taxation arrangements in respect to native title compensation. Specifically, this would involve payments made by non-native title parties by way of compensation for the temporary impairment or suspensions of native title becoming tax deductible, in the hands of the person making the payment, over the period of the impairment. Government further proposes implementing a withholding tax (in the order of 4%) on all payments received by native title parties by way of compensation. The terms for such a tax are currently being drafted by the Australian Taxation Office.

The multiple statutory pathways for securing native title compensation, and the myriad forms it is taking, will create significant problems for the purposes of taxation. For example, it is unclear how a tax on non-monetary forms of compensation could be measured or collected, especially given the lack of detailed information about the content of most native title agreements. Furthermore, it is debatable whether a tax should be imposed on substitute goods and services that otherwise would be provided by governments as part of their standard essential services. It is also arguable that compensation income subsequently used by native title parties to cover their own later negotiation of other native title matters should be tax deductible in their hands, as is proposed for resource developers.

It might appear ironic at best to native title holders that they will be taxed for the extinguishment or impairment of an inalienable cultural property right that is fundamental to their individual and group identity. At a more mundane economic level, it is likely that any eventual implementation of a native title tax will act to increase transaction costs. Native title claimants and holders will simply attempt to transfer the tax as an additional 'top-up' to the total negotiated compensation package.

## Conclusion

This paper has described, on the basis of an ethnographic review and long-term field research, the broad parameters of an Aboriginal discourse about compensation derived under Aboriginal law and custom. It has also examined the different statutory pathways for compensation under the *Native Title Act 1993*, and highlighted the contending evaluations and principles in operation between these two modes of discourse, and their implications for securing just and practical outcomes. There will continue to be inherent tensions and significant differences between how Aboriginal and other parties view the matter of compensation, in respect to its causes, resolution and outcomes. Some options have been proposed for dealing with the challenges that are arising.

The negotiation of native title compensation is becoming the vehicle for developing other kinds of social and economic relationships, just as has occurred under other statutory jurisdictions. Native title negotiations do not occur in a vacuum; the realities of community life intrude, Aboriginal priorities and value systems are highly influential, as are their perceptions of the continuing historical fact of dispossession and ongoing socioeconomic disadvantage.

When we try to understand exactly what it is that parties want out of compensation, we must accept that the process has psychological, cultural, symbolic and political dimensions which have a profound effect on the process and outcomes. These dimensions cannot easily be ignored, or excluded from the negotiation and implementation of agreements.

In accordance with their own social preferences and conceptualisations of cultural property, the *process* of negotiating compensation may itself be part of compensation for many native title groups. The period of negotiation may be the first time their rights and concerns about country and culture are given a voice at the table. They will routinely invoke a range of principles and criteria derived from their own extant compensatory regimes, and attempt to insert culturally-based values into court and negotiation proceedings. The facts relevant to current considerations of compensation are argued by native title parties to legitimately include the burden of history and their hopes. In every statutory pathway, native title parties will invariably link process and outcomes together, and have great expectations of both. In accordance with a widespread culturally-based logic, many native title parties will start from an inclusive position as to what should be considered, and see the process of negotiation and court action as forming part of the process of restitution, recompense, recognition and beneficial settlement.

Current negotiation and mediation practice suggests some parties are trying to adopt a workable approach to compensation. It remains to be seen, however, whether the common law recognition of native title will be able to create a recognition space for compensation that addresses the intrinsic value of land to dispossessed Aboriginal owners. This paper suggests that to secure just terms and sustainable outcomes, all parties need to be made more aware of the implications attached to following different statutory pathways for compensation.

Other parties also need to be better informed about the nature of culturally-based values and logic that are routinely being brought to bear on negotiations and in the courts by native title groups. A new ‘compensation recognition space’ is needed which recognises both native title as a form of cultural property, and native title compensation as *sui generis*. With that combination, it may be possible to translate Indigenous compensatory principles and practices, in all their contemporary diversity, into just and sustainable agreements.

## Notes

1. The reference to ‘Aboriginal’ rather than ‘Indigenous’ is intentional as the paper focuses on the ethnographic literature relevant to Aboriginal groups and their compensation processes. Conclusions presented here should not be taken as being applicable to Torres Strait Islander peoples who may exhibit distinctive cultural differences.
2. In most cases where ‘land’ is used in this paper it can be taken as an abbreviation for ‘land and sea’. For coastal-dwelling people the one is the continuation of the other.
3. Gray (1994: 204) further acknowledges that: ‘This gathering [legal] perception of stewardship emulates something of the greater humility expressed in the Australian Aboriginals’ orientation towards land resources’.
4. I would like to thank Peter Sutton for suggesting the significance of contemporary Indigenous competition over compensation as a mechanism which reveals that which is ‘most lost’, and hence most fought over in the native title arena.
5. For example, when orders are made by the Federal Court that compensation is payable (s. 94), and when referring to requests that compensation be in a form other than monetary payments.
6. For example, under an Indigenous Land Use Agreement (ILUA).
7. For example, statutory traditional owners determined as such under the *Aboriginal Land Rights (NT) Act 1976* (ALRA) and whose statutory rights and interests over land and waters replace, or have converted, native title rights and interest, have their statutory rights and interests under the ALRA ‘covered by the expression native title and native title rights and interests’ (s. 223(3)). They are regarded as native title *holders* and therefore may act as such for the purposes of making a claim for compensation under the *Native Title Act 1993*, or for the purposes of entering into an ILUA. This ‘coverage’ also applies to State-based land rights legislation.
8. Whether that be for past acts (s. 18), intermediate period acts (s. 22E), future acts (s. 53(1)(a)), or the application of any provisions of the Act in any particular case (s. 53(1)(b)).
9. A fact that has been described by Bartlett (2000: 443) as ‘dispossession without compensation’.



10. In that agreed determination, compensation for the extinguishment of native title over land proposed for a subdivision was agreed to as an amount equivalent to 150 per cent of freehold; with the 50 per cent being for 'special attachment' (Lavarche & Riding 1998). The agreement provided for what was referred to as an 'up-front' payment of \$256,000 in compensation for extinguishment, and \$482,000 up-front for compulsory acquisition; a total of \$738,000 for extinguishment over a total of 5 hectares of land (Blackshield 1997).
11. Federal Court offices in some States are currently reconsidering this approach in favour of retaining a copy of the Deed of Agreement.
12. For more detail on the right to negotiate and its compensation mechanisms see Edmunds & Smith (2000); Litchfield (1999); Sumner (2000).
13. For more detail on the three types of ILUAs and their relevant criteria see Lane (2001); Smith (1998).
14. In one sense, this comment appears at odds with French's ongoing attempt to broaden the common law consideration of native title, and expand the conceptual parameters of what constitutes extinguishment.
15. There are several legal discussions of what 'just terms' might constitute (see e.g. Bartlett 2000; Neate 1999).
16. This characterisation of core and peripheral impacts has been partly recognised under the ALRA where people in an 'area affected' by an act can be included as beneficiaries, alongside the 'traditional owners', of any compensatory payments secured under resource development agreements.

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